

No. 12633

2655

United States
Court of Appeals
for the Ninth Circuit.

DAY-BRITE LIGHTING, INC., a Corporation,
Appellant,
vs.

RUBY LIGHTING CORPORATION,
Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 299)

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

NOV - 3 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Los Angeles 14, Calif.

In the United States District Court of Southern
District of California, Central Division

Civil Action No. 8381-M

DAY-BRITE LIGHTING, INC., a Corporation,
Plaintiff,

vs.

RUBY LIGHTING CORPORATION, a Corpora-
tion,

Defendant.

COMPLAINT FOR INFRINGEMENT OF
UNITED STATES LETTERS PATENT
Nos. D-138,990 AND D-143,641

Plaintiff avers as follows:

First Count

I. Plaintiff

Plaintiff, Day-Brite Lighting, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and has a place of business in the City of St. Louis, State of Missouri.

II. Defendant

Defendant, Ruby Lighting Corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has its principal place of business and a regular and established place of business in the City of Los Angeles, County of Los Angeles, State of California. [2*]

III. Jurisdiction

(a) The jurisdiction of this Court is based upon the Patent Laws of the United States of America.

(b) The acts of infringement hereinafter complained of were, and are being, committed in the County of Los Angeles, State of California, within this District, and elsewhere within the United States.

IV. Title to Patent

On October 3, 1944, United States Letters Patent No. D-138,990 were duly and legally issued to Day-Brite Lighting, Inc., a corporation, Plaintiff, for an invention in Design for a Louvered Fluorescent Lighting Fixture, on the application of David J. Biller of St. Louis, Missouri, and Bertram A. Kaepfel of Normandy, Missouri; and said Plaintiff was at the time of the infringement herein complained of, and ever since the issue of said Letters Patent No. D-138,990 has been, and now is, the owner of the entire right, title, and interest in and to said Letters Patent No. D-138,990 and all causes of action for infringement thereof.

V. Infringement

Defendant has been for a long time past, and still is, infringing said Letters Patent No. D-138,990 by making, using, and selling lighting fixtures embodying the patented invention and will continue to do so unless enjoined by this Court.

VI. Notice

Upon information and belief, Plaintiff has placed the required statutory notice upon all lighting fixtures sold by Plaintiff under said Letters Patent No. D-138,990, and has given written notice to Defendant of its said infringement. [3]

VII. Damage

Defendant has derived unlawful gains and profits from such infringement which Plaintiff would otherwise have received but for such infringement of said Letters Patent No. D-138,990, and Plaintiff has been greatly damaged thereby.

Second Count

VIII. Plaintiff

Plaintiff, Day-Brite Lighting, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and has a place of business in the City of St. Louis, State of Missouri.

IX. Defendant

Defendant, Ruby Lighting Corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has its principal place of business and a regular and established place of business in the City of Los Angeles, County of Los Angeles, State of California.

X. Jurisdiction

(a) The jurisdiction of this Court is based upon

the Patent Laws of the United States of America.

(b) The acts of infringement hereinafter complained of were, and are being, committed in the County of Los Angeles, State of California, within this District, and elsewhere within the United States.

XI. Title to Patent

On January 29, 1946, United States Letters Patent No. D-143,641 were duly and legally issued to Day-Brite Lighting, Inc., a corporation, Plaintiff, for an invention in Design for a Louvered [4] Fluorescent Lighting Fixture, on the application of David J. Biller of St. Louis, Missouri, and Bertram A. Kaepfel of Normandy, Missouri; and said Plaintiff was at the time of the infringement herein complained of, and ever since the issue of said Letters Patent No. D-143,641 has been, and now is, the owner of the entire right, title, and interest in and to said Letters Patent No. D-143,641 and all causes of action for infringement thereof.

XII. Infringement

Defendant has been for a long time past, and still is, infringing said Letters Patent No. D-143,641 by making, using, and selling lighting fixtures embodying the patented invention and will continue to do so unless enjoined by this Court.

XIII. Notice

Upon information and belief, Plaintiff has placed the required statutory notice upon all lighting fixtures sold by Plaintiff under said Letters Patent

No. D-143,641 and has given written notice to Defendant of its said infringement.

XIV. Damage

Defendant has derived unlawful gains and profits from such infringement which Plaintiff would otherwise have received but for such infringement of said Letters Patent No. D-143,641, and Plaintiff has been greatly damaged thereby.

Wherefore, Plaintiff prays for:

(a) A final injunction against further infringement by Defendant and those controlled by Defendant;

(b) An accounting and judgment for damages and for the profits of Defendant by reason of said infringement; [5]

(c) An assessment of and judgment for costs against Defendant; and

(d) Such other relief as the Court may deem just and proper.

Dated: At Los Angeles, California, this 29th day of June, 1948.

CARR & CARR & GRAVELY,
JOSEPH J. GRAVELY,
HARRIS, KIECH, FOSTER &
HARRIS,
WARD D. FOSTER,
JACK BARRY, JR.,

By /s/ JACK BARRY, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed June 29, 1948. [6]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Defendant, Ruby Lighting Corporation, for its answer to the complaint, Admits, Denies and Alleges as Follows:

First Count

1. Defendant admits the allegations of paragraph I of the complaint.

2. Defendant admits the allegations of paragraph II of the complaint.

3. (a) Defendant admits the allegation of subdivision (a) of paragraph III of the complaint. [7]

(b) Defendant denies the allegations of subdivision (b) of paragraph III of the complaint and denies that it has infringed, either directly or contributorily, any claim or claims of any patent owned by the plaintiff, and denies that it has done any act or thing invading any right of any nature whatsoever of the plaintiff.

4. Defendant admits that United States Letters Patent No. D-138,990 were issued on October 3, 1944, but states that it is without knowledge or information sufficient to form a belief as to the truth of the other averments of paragraph IV of the complaint, and denies each and every of said averments.

5. Defendant denies each and every allegation of paragraph V of the complaint and specifically denies that it has infringed Letters Patent No. D-138,990.

6. Defendant admits that it received a notice dated August 12, 1947, accusing defendant of having

infringed patent No. D-138,990, patent No. D-143,641 and patent No. 2,411,952; defendant denies each and every of the other allegations of paragraph VI of the complaint.

7. Defendant denies each and every of the allegations contained in paragraph VII of the complaint.

And as Further and Affirmative Defenses, Defendant, Ruby Lighting Corporation, Alleges as Follows:

8. Defendant alleges that the alleged invention claimed in Letters Patent No. D-138,990 was not patentable to the alleged inventors named therein, under the provisions of [8] R.S. § 4929, § 4933, 35 U.S.C. 73, and that therefore said patent is invalid and void because:

(a) The alleged inventors, David J. Biller and Bertram A. Kaepfel, were not the original or first inventors of the alleged invention described and claimed in said Letters Patent or any material or substantial part thereof, but on the contrary that which is alleged to be patented by said Letters Patent and all substantial and material parts thereof were (if any invention were required) prior to the date of the alleged invention by the applicants for said Letters Patent, invented by others and more particularly those others identified in the following list, and the applicants for those patents identified in the following list;

(b) The thing or things alleged to be patented by said Letters Patent and all material and substantial parts thereof were patented and described

in printed publications in this or a foreign country before their alleged invention thereof, or more than one year prior to the date of application for said Letters Patent, and more particularly the patents and publications identified in the following list;

(c) The thing alleged to be patented by said Letters Patent and all material and substantial parts thereof were known and used by others in this country before said alleged inventors' alleged invention thereof, and more particularly by those others identified in the following lists, and the inventors named in the patents identified in the following list, and the assignees named in said patents, residing at the addresses stated in said patents; and [9]

(d) The thing alleged to be patented by said Letters Patent and all material and substantial parts thereof were in public use and on sale in this country for more than one year prior to the date of application for said Letters Patent, and more particularly by those identified in the following list, and by the applicants for and the patentees of the patents hereafter listed, residing at the addresses stated in said patents and publications:

United States Patents

Patent No.	Date	Name
D-130,809	Dec. 23, 1941	Waltman
D-131,845	Mar. 31, 1942	Biller
D-136,453	Oct. 5, 1943	Masterson
2,339,010	Jan. 11, 1944	Greenwald
2,364,992	Dec. 12, 1944	Maurette
2,411,952	Dec. 3, 1946	Biller

Publications

1941 Catalog "Fluorescent Lighting," published by Ruby Lamp Mfg. Co., Inc., 430 West 14th Street, New York.

The defendant seeks leave to amend this answer to include other persons and corporations, patents and publications as soon as they are ascertained.

9. Defendant alleges that the Letters Patent in suit are invalid and void because the alleged invention purportedly described and claimed in said patent No. D-138,990 was merely the selection and adaptation of previously existing forms and devices within the powers of the ordinary designer; [10] that said alleged invention is not new, original, ornamental, and the product of invention as required by the United States patent statutes, rules and regulations pertaining to design patents; that the design lacks beauty, ornamentation and originality, and is only the necessary response to the purpose of the article, and the configuration thereof is necessary by function; and that the alleged invention is not the product of invention which is the purpose of the Constitution and patent laws to encourage and reward, and involves nothing more than the exercise of mere mechanical skill and the powers of the ordinary designer in view of the state of the art as known at the time and long prior to the alleged invention by the applicants for said Letters Patent.

10. Defendant alleges that the patent in suit No. D-138,990 is invalid and void because the Commissioner of Patents did not cause a proper examina-

tion to be made as to the alleged new invention defined by the claim of said patent, and had such an examination been made properly, it would have appeared that the applicants for said Letters Patent were not entitled thereto, and said Letters Patent would not have been issued, and that said Letters Patent were inadvertently issued.

11. Defendant alleges that the patent in suit No. D-138,990 is invalid and void because defendant is informed and believes and therefore alleges that the matters purporting to be covered by the claim of said patent were not the joint invention of the applicants for said patent but were the sole invention of David J. Biller, if any invention were required. [11]

Second Count

12. Defendant admits the allegations of paragraph VIII of the complaint.

13. Defendant admits the allegations of paragraph IX of the complaint.

14. (a) Defendant admits the allegations of subdivision (a) of paragraph X of the complaint.

(b) Defendant denies each and every of the allegations of subdivisions (b) of paragraph X of the complaint, and specifically denies that it has infringed, either directly or contributorily, any claim or claims of any patent owned by the plaintiff or in which the plaintiff has any right, title or interest.

15. Defendant admits that United States Letters Patent No. D-143,641 were issued January 29, 1946,

but states that it is without knowledge or information sufficient to form a belief as to the truth of the other averments of paragraph XI of the complaint, and denies each and every of said averments.

16. Defendant denies each and every allegation of paragraph XII of the complaint and specifically denies that it has infringed Letters Patent No. D-143,641.

17. Answering paragraph XIII of the complaint, defendant repeats and alleges as its answer thereto each and every of the allegations contained in paragraph 6 of its answer above set forth. [12]

18. Defendant denies each and every of the allegations contained in paragraph XIV of the complaint.

19. Defendant adopts, repeats and realleges as paragraph 19 of its answer to the Second Count of the complaint each and every of the allegations contained in paragraph 8 of defendant's answer above set forth, with like effect as if herein fully repeated but with reference to Letters Patent No. D-143,641.

20. Defendant adopts, repeats and realleges as paragraph 20 of its answer to the Second Count of the complaint each and every of the allegations contained in paragraph 9 of defendant's answer above set forth, with like effect as if herein fully repeated but with reference to Letters Patent No. D-143,641.

21. Defendant adopts, repeats and realleges as paragraph 21 of its answer to the Second Count of

the Complaint each and every of the allegations contained in paragraph 10 of defendant's answer above set forth, with like effect as if herein fully repeated but with reference to Letters Patent No. D-143,641.

22. Defendant adopts, repeats and realleges as paragraph 22 of its answer to the Second Count of the complaint each and every of the allegations contained in paragraph 11 of defendant's answer above set forth, with like effect as if herein fully repeated but with reference to Letters Patent No. D-143,641.

23. Defendant alleges that said Letters Patent No. D-143,641 are invalid and void because while the said application for said Letters Patent was pending in the United States Patent Office, the said application was amended, modified and changed, and the purported Letters Patent as issued relate to [13] another and different invention (if any) from that as originally filed.

Wherefore, Defendant prays:

1. That Letters Patent Nos. D-138,990 and D-143,641, and each of them, be held invalid, null and void.

2. That a judgment and decree be entered denying the plaintiff injunctive relief, and any relief whatsoever, and holding that this defendant has not infringed, and is not infringing, the Letters Patent in suit, and any of them.

3. That the complaint be dismissed, with costs and reasonable attorneys' fees to this defendant, and

that this defendant have such other and further relief as to this Court may seem just and proper.

Dated at Los Angeles, California, this 18th day of August, 1948.

KNIGHT, GITELSON &
ASHTON,

By /s/ ROBERT R. ASHTON,
C. A. MIKETTA,

/s/ C. A. MIKETTA,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 18, 1948. [14]

[Title of District Court and Cause.]

STIPULATION RE PROOF

It Is Hereby Stipulated, by and between the parties to the above-entitled action, through their respective counsel, and subject to the approval of the Court, that at the principal trial of this action Plaintiff need not prove the full extent of the recoveries to which it is entitled if the Plaintiff prevails upon the issues of patent validity and infringement, whether such recoveries be in the form of general damages, due compensation to the Plaintiff, reasonable royalties, costs, interests, attorneys' fees, or otherwise, but that such proof of the full extent of such recoveries may be presented after an interlocutory judgment of patent validity and infringe-

ment in such [15] proceedings as the Court may direct.

This stipulation is made to facilitate the progress of the trial of the principal cause.

Dated: At Los Angeles, California, this 10th day of June, 1949.

CARR & CARR & GRAVELY,
JOSEPH J. GRAVELY.
HARRIS, KIECH, FOSTER &
HARRIS,
WARD D. FOSTER,
JACK BARRY, JR.,

By /s/ WARD D. FOSTER,
Attorneys for Plaintiff.

KNIGHT, GITELSON &
ASHTON,
C. A. MIKETTA,

By /s/ C. A. MIKETTA,
Attorneys for Defendant.

Approved and It Is So Ordered, this 17 day of June, 1949.

/s/ JACOB WEINBERGER,
Judge.

[Endorsed]: Filed June 20, 1949. [16]

[Title of District Court and Cause.]

FIRST AMENDMENT TO COMPLAINT

The Complaint heretofore filed herein is hereby amended by adding thereto the following:

Third Count

I. Parties

Plaintiff reasserts and adopts herein as fully as if set forth at length herein the allegations of Paragraphs I and II of the Complaint filed herein on or about June 29, 1948.

II. Jurisdiction

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00). [17]

This action arises under the laws of the United States of America relating to unfair competition, including 28 U.S.C. 338 (b).

III. Creation of Business, Market and Demand

Plaintiff has for many years prior to the acts of Defendant herein complained of, built up and enjoyed a profitable business in the manufacture and sale of fluorescent lighting fixtures, and Plaintiff has spent large sums of money in advertising its said products throughout the United States.

As a result of its investment in preparing to produce commercially and in producing commercially and in large quantities its said fluorescent lighting fixtures, and as a result of the expenditure of much time and effort in promoting the sales of its said

products, Plaintiff has created and developed a large market and demand for its said products throughout the United States and a recognition of the merit of its said products and their dependability, and, as a result of such expenditure of money, time, and effort, the public recognizes Plaintiff's said products and their merit by their appearance.

IV. Defendant's Acts of Unfair Competition

Plaintiff alleges, upon information and belief that: Defendant is, and since prior to the filing of the Complaint herein has been, selling fluorescent lighting fixtures having the distinctive appearance of Plaintiff's fluorescent lighting fixtures, and Defendant has sold and palmed off upon the purchasing public and the members thereof, and the purchasing public and the members thereof have purchased from Defendant or wholesalers and jobbers purchasing from Defendant, such products of Defendant as and for Plaintiff's said products; and Defendant has in its said fluorescent lighting fixtures copied and [18] imitated the distinctive appearance of Plaintiff's said fluorescent lighting fixtures and has, by representations that its said products are the said products of Plaintiff and otherwise, appropriated the market and demand of the public for Plaintiff's said products created and developed by Plaintiff as the result of the expenditure of large sums of money, time, and effort as aforesaid; and Defendant has copied, imitated, and appropriated the distinctive appearance and appeal to the eye and esthetic sense of the purchasing public and the members thereof of Plain-

tiff's said fluorescent lighting fixtures and all of the non-functional elements and parts thereof; and such distinctive appearance and such elements and parts thereof have come to indicate to the purchasing public and the members thereof origin in Plaintiff of fluorescent lighting fixtures having such distinctive appearance and containing such elements and parts thereof by virtue of Plaintiff's expenditure of time and money in creating and developing said market and demand and in selling extensively throughout the United States its said fluorescent lighting fixtures.

Plaintiff alleges, upon information and belief, that: Defendant intends, and threatens to continue, to perform the acts complained of herein, unless restrained by this Court; the acts of Defendant complained of herein are related to and constitute a part of Defendant's acts infringing upon Plaintiff's patents as alleged in the first count and second count of said Complaint on file herein and constitute unfair competition with the Plaintiff and an aggravation of the damages to Plaintiff arising from Defendant's infringement of Plaintiff's said patents.

Wherefore, Plaintiff prays, in addition to the relief sought by the Complaint heretofore filed herein, for:

(i) A final injunction against the Defendant, restraining the Defendant from the performance of the acts of unfair [19] competition alleged in this First Amendment to Complaint;

(j) An accounting for the profits realized by Defendant from the acts of said Defendant com-

plained of in this First Amendment to Complaint;

(k) An assessment of costs and an allowance of judgment for attorneys' fees against Defendant; and

(l) A judgment for such other and further relief as to the Court may seem just.

Dated: At Los Angeles, California, this 1st day of March, 1950.

CARR & CARR & GRAVELY,
JOSEPH J. GRAVELY.

HARRIS, KIECH, FOSTER &
HARRIS,
WARD D. FOSTER,
JACK BARRY, JR.,

By /s/ WARD D. FOSTER,

Attorneys for Plaintiff. [20]

Upon the application of Plaintiff by its counsel, and good cause appearing therefor,

It Is Hereby Ordered that the Complaint on file herein may be, and the same hereby is, amended by the First Amendment to Complaint, copy of which is attached hereto, and permission to file which is hereby granted.

Dated: At Los Angeles, California, this 1st day of March, 1950.

.....,
Judge.

Lodged March 2, 1950.

[Endorsed]: Filed March 3, 1950. [21]

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDMENT
TO COMPLAINT

Defendant, Ruby Lighting Corporation, for its Answer to the First Amendment to Complaint, admits, denies and alleges as follows:

1. Defendant admits the allegations of Paragraph I of the First Amendment to Complaint.

2. Defendant admits the allegations of Paragraph II of the First Amendment to Complaint.

3. Defendant denies each and every allegation of Paragraph III of the First Amendment to Complaint.

4. Defendant denies each and every allegation of Paragraph IV of the First Amendment to Complaint. [22]

Wherefore, defendant prays, in addition to the relief sought by the Answer heretofore filed herein,

1. That a judgment and decree be entered denying the plaintiff's injunction relief, and any relief whatsoever, and holding that defendant has not committed acts of unfair competition against the plaintiff.

2. That the defendant be awarded his costs and reasonable attorney's fees and such other and further relief as to this Court may seem just and proper.

Dated at Los Angeles, California, this 6th day of
March, 1950.

KNIGHT, GITELSON &
ASHTON,
C. A. MIKETTA,
/s/ C. A. MIKETTA,
W. W. GLENNY,
/s/ W. W. GLENNY,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 6, 1950. [23]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday, the 22nd day of March, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

MINUTE ORDER

This cause having been tried by the court, and the court having heretofore ruled on all issues except unfair competition, and that issue having been taken under submission, and the court having duly considered the matter, the court now finds in favor of the defendant and against the plaintiff on the issue of unfair competition, and orders that judgment be accordingly.

Counsel for defendant will prepare and present proposed findings of fact, conclusions of law and judgment on all issues, pursuant to local Rule 7, within ten days.

[Title of District Court and Cause.]

AFFIDAVIT OF C. A. MIKETTA
RE ATTORNEYS' FEES AND COSTS

State of California,
County of Los Angeles—ss.

C. A. Miketta, being duly sworn, deposes and says that he is an attorney at law, counsel for defendant Ruby Lighting Corporation in the above-entitled action, and has personally handled and is familiar with all of the proceedings had in such litigation.

That plaintiff originally charged defendant Ruby with infringement of two design patents and a mechanical construction patent No. 2,411,952 (plaintiff's Exhibit 5); that affiant made an investigation and study regarding said patent No. 2,411,952, reported the results thereof to plaintiff and defendant and the [25] plaintiff dropped the charge as to patent No. 2,411,952. That plaintiff took depositions of five of defendant's officers and employees, which depositions were not introduced into evidence by plaintiff during the trial of the action.

That affiant and his associate have worked a total of 406 hours on the above case, including location and study of prior patents, publications and catalogues, analysis of plaintiff's patents and defendant's devise, legal research, preparation of answer, appearances in Court on call of calendar, considering and entering into stipulations, attendance at taking of depositions of defendant's officers and

employees by plaintiff, preparation of pretrial memoranda and points and authorities, preparation of answer to first amendment to complaint, preparation of memoranda on alleged unfair competition, and time and services during trial on February 28, March 1, 2, and 3, 1950.

That the reasonable and fair value of the services rendered and for which defendant has been billed is \$6,240; that defendant has paid about one-half of same sum prior to trial; that the disbursements for reporter's fees, photostats, file histories, blueprints and exhibits in connection with this case, which have been paid heretofore by defendant amount to \$684.13, whereby the defendant has incurred costs and expenses as a direct result of plaintiff's action of \$6,924.13 and prays recovery thereof.

Dated this 29th day of March, 1950.

/s/ C. A. MIKETTA.

Subscribed and sworn to before me this 29th day of March, 1950.

[Seal] /s/ MILDRED K. BADGER,
Notary Public in and for the County and State
Above Named.

My Commission Expires Mar. 2, 1952.

Receipt of copy acknowledged.

[Endorsed]: Filed March 30, 1950. [26]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause coming before the Court for trial on final hearing and trial being had on February 28, March 1, 2 and 3, 1950, during which witnesses were heard, demonstrations had and observed by the Court, exhibits filed and considered, briefs and memoranda having been filed and oral argument had, the Court, having rendered its decision and being fully advised in the premises, does hereby make the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiff, Day-Brite Lighting Corporation, Inc., is a Missouri corporation engaged in the manufacture and sale of fluorescent lighting fixtures. Defendant, Ruby Lighting Corporation, is a California corporation having a regular and principal place of business at Los Angeles, California, and is also engaged in the manufacture and sale of fluorescent lighting fixtures.

2. Prior to the filing of the complaint herein plaintiff charged defendant with infringement of United States Letters Patent No. D-138,990, No. D-143,641 and No. 2,411,952, by written notice dated August 12, 1947. Plaintiff's complaint, as filed, charged defendant with infringement of United States Letters Patent No. D-138,990 and No. D-143,641 and the first amendment to the complaint,

filed at the end of plaintiff's prima facie case, charged defendant with unfair competition.

3. The patents in suit are patents for designs for fluorescent lighting fixtures, issued under the provisions of R.S. 4229, 4933 (35 U.S.C. 73). Patent No. D-143,641 (plaintiff's Exhibit 4) was filed July 28, 1944. The file history of this patent shows that the application for patent was originally rejected by the Patent Office upon the ground that the design was not inventively different from the design of "Challenger No. 77" fixture, and applicants distinguished from such prior art fixture by calling attention to their use of a V-shaped longitudinal louver having a hollow longitudinal bottom bead of circular cross-section, the use of specular metal for such V-shaped louvers, and notched upper edges in cross louvers which are reflected in the specular V-shaped louver.

4. More than one year prior to the filing of the application for United States Letters Patent No. D-143,641 there were published and known in the United States, fluorescent lighting fixtures having bottom light-emitting openings provided with longitudinal and transverse louvers, as shown by the "Challenger No. 77" fixture, and by other prior fixtures not considered by the Patent Office, including those illustrated in patents and specifications forming a part of defendant's Exhibit I and particularly subdivisions 1, 2, 4, 6, 7, 9, 10, 12, 17, 21, 22 and 23, thereof. [29] Some of these prior fixtures included V-shaped longitudinally extending louvers.

5. Patent No. D-138,990 (plaintiff's Exhibit 3) shows a fluorescent lighting fixture having the same longitudinal and transverse louvers as appear in patent No. D-143,641 and in addition, a step-down end portion having a zigzag ornamentation in its lower portion, and a protruding upper portion provided with a central boss; the upper and lower rails of the side panels are connected by three parallel bars integral with the upper and lower rails. The file history of this patent shows that the only prior art reference of record was the "Challenger No. 77" fixture.

6. More than one year prior to the filing of the application for United States Letters Patent D-138,990, there were published and known in the United States, fluorescent lighting fixtures of the same general appearance including step-down end portions, inclined side panels and louvered bottom as shown by the patents, publications, drawings and photographs embraced by defendant's Exhibits G, I and L. Inclined sides perform the function of distributing lighting outwardly and downwardly while step-down ends perform the function of allowing light to pass upwardly and outwardly against the ceiling. Louvers in the bottom perform the function of preventing glare due to direct observation of fluorescent tubes. It was common practice in the prior art to use elements connecting upper and lower rails of side panels of a lighting fixture. Length of fixtures was appropriate to the length of fluorescent tube to be employed.

7. Fluorescent light fixtures have common characteristics by reason of the utilitarian impulse. The evidence shows that lighting fixtures are largely sold to engineers, architects and builders on specifications and efficiency in the distribution of light by such fixtures, and ease of operating maintenance.

8. Plaintiff has manufactured and sold and is manufacturing and selling a fluorescent lighting fixture under the name "Viz-Aid" (exemplified by plaintiff's Exhibit 13), said fixture allegedly embodying the designs of Letters Patent No. D-138,990 and No. D-143,641. Plaintiff's "Viz-Aid" fixture does not include a V-shaped longitudinal louver having a hollow longitudinal bottom bead of circular cross-section as shown in the drawings of patent No. D-143,641; the "Viz-Aid" fixture does not embody a boss in the protruding upper end portion shown in patent No. D-138,990; the "Viz-Aid" fixture embodies the construction described in patent No. 2,411,952 (plaintiff's Exhibit 5).

9. Defendant, Ruby Lighting Corporation, has been engaged in the business of manufacturing lighting fixtures in Los Angeles since 1942; its president, Ben Ruby, has been in the lighting fixture business since 1927. Plaintiff contends that fixtures manufactured and sold by defendant under the name "Paramount," and exemplified by plaintiff's Exhibits 14 and 15, infringe the Letters Patent in suit and that defendant has performed acts of unfair competition in connection with the manufacture and sale of said fixtures.

10. Defendant's fixtures, exemplified by plaintiff's Exhibits 14 and 15, do not employ a V-shaped longitudinally extending louver having a hollow longitudinal bottom bead of circular cross-section of the character shown in Letters Patent No. D-143,641. Defendant does not use specular metal on the longitudinal louvers of its "Paramount" fixtures, Exhibits 14 and 15.

11. Defendant does not use, in its "Paramount" fixtures exemplified by Exhibits 14 and 15, a zigzag design such as is shown in Letters Patent No. D-138,990; an entirely different design or ornamentation is used by defendant on its accused fixtures. Each of the step-down ends of defendant's fixtures are single castings which do not include a protruding upper portion. [31] Defendant's fixtures do not employ the construction of plaintiff's fixtures and the louvered bottom is manipulated in a totally different manner. Defendant's fixtures, exemplified by Exhibits 14 and 15, employ forms and proportions which are common to lighting fixtures as a class and illustrated in prior art fixtures, and do not involve inventive change over the prior art.

12. The evidence does not establish that the purchasing public recognizes plaintiff's fluorescent fixtures as plaintiff's products by reason of the appearance of plaintiff's products. The evidence does not establish that plaintiff's lighting fixtures embody non-functional distinctive elements of appearance which are associated with the purchasing public with plaintiff as the source. There is no evidence

that the form of "Viz-Aid" fixtures is associated in the minds of prospective customers or purchasers with plaintiff as the source. The evidence does not establish secondary meaning in the appearance or form of fixtures so sold by plaintiff.

13. Plaintiff has not proven and established that defendant has sold and palmed off upon the purchasing public, a lighting fixture or fixtures made by defendant as and for plaintiff's fixture or fixtures. There is no evidence that defendant has misrepresented its products as those of plaintiff.

14. Defendant has not copied non-functional, ornamental and distinctive elements of design from plaintiff.

Conclusions of Law

1. This Court has jurisdiction of the parties and of the subject matter.

2. Title in United States Letters Patent No. D-138,990 and No. D-143,641 is vested in plaintiff, Day-Brite Lighting, Inc.

3. If valid, United States Letters Patent No. D-138,990 is limited to a design including an end plate provided with [32] specific zigzag ornamentation in its lower portion, as illustrated in the drawings of said Letters Patent.

4. If valid, United States Letters Patent No. D-143,641 is limited to a design including a longitudinal V-shaped louver having a hollow longitudinal bottom bead of circular cross-section, as

illustrated in the drawings of said Letters Patent.

5. Defendant, Ruby Lighting Corporation, has not infringed United States Letters Patent No. D-138,990 by the manufacture and sale of fluorescent lighting fixtures exemplified by Exhibits 14 and 15.

6. Defendant, Ruby Lighting Corporation, has not infringed Letters Patent No. D-143,641 by the manufacture and sale of fluorescent lighting fixtures exemplified by Exhibits 14 and 15.

7. Defendant, Ruby Lighting Corporation, has not performed acts of unfair competition as alleged in the first amendment to the complaint herein.

8. The complaint will be dismissed on the merits, with the judgment and decree in conformity to the findings and conclusions, with costs and attorneys' fees to defendant.

Dated this 12th day of April, 1950.

/s/ JAMES M. CARTER,

Judge, U. S. District Court.

Receipt of copy acknowledged.

Lodged March 30, 1950.

[Endorsed]: Filed April 12, 1950. [33]

In the United States District Court, Southern District of California, Central Division

Civil Action No. 8381-C

DAY-BRITE LIGHTING, INC., a Corporation,
Plaintiff,

vs.

RUBY LIGHTING CORPORATION, a Corporation,
Defendant.

JUDGMENT AND DECREE DISMISSING
COMPLAINT AND FIRST AMENDMENT
THERE TO ON THE MERITS WITH
COSTS & ATTORNEYS' FEES TO DEFENDANT

This cause having come on for trial and having been heard February 28, 1950, March 1, 2 and 3, 1950, upon the pleadings and proofs, briefs and memoranda having been filed, and oral arguments being had, and the Court being fully advised in the premises; now, therefore, upon consideration thereof and upon the findings of fact and conclusions of law filed concurrently herewith,

It Is Hereby Ordered, Adjudged and Decreed by the Court as Follows:

1. The Court has jurisdiction of the parties and of the subject matter. [35]

2. Letters Patent No. D-138,990, assigned to plaintiff Day-Brite Lighting, Inc., a corporation, if valid, is limited to the specific zigzag design in the

lower portion of the end of a fluorescent lighting fixture, as shown in the drawings forming a part of said Letters Patent.

3. Letters Patent No. D-143,641, assigned to plaintiff Day-Brite Lighting, Inc., a corporation, if valid, is limited to the specific longitudinally extending V-shaped louver provided with a longitudinal bottom bead of circular cross-section shown in the drawings of said Letters Patent.

4. Defendant Ruby Lighting Corporation has not infringed Letters Patent No. D-138,990 and No. D-143,641, or either of them, if said Letters Patent or either of them are valid.

5. Defendant Ruby Lighting Corporation has not performed and is not guilty of acts of unfair competition.

6. The complaint and first amendment to the complaint are dismissed with prejudice. Defendant shall recover from plaintiff its costs of suit and disbursements, including reporter's fees and attorneys' fees in the sum of \$3,000.00. Costs taxed in the sum of \$388.99.

Dated this 12th day of April, 1950.

/s/ JAMES M. CARTER,

United States District Judge.

Judgment entered April 12, 1950.

Receipt of copy acknowledged.

Lodged March 30, 1950.

[Endorsed]: Filed April 12, 1950. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Day-Brite Lighting, Inc., Plaintiff herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment and decree entered in this action on April 12, 1950.

Dated: At Los Angeles, California, this 9th day of May, 1950.

CARR & CARR & GRAVELY,
JOSEPH J. GRAVELY.

HARRIS, KIECH, FOSTER &
HARRIS,

WARD D. FOSTER,
JACK BARRY, JR.,

By /s/ WARD D. FOSTER,
Attorneys for Plaintiff.

[Endorsed]: Filed May 10, 1950. [38]

[Title of District Court and Cause.]

COST AND SUPERSEDEAS BOND ON APPEAL

Know All Men by These Presents,

That Massachusetts Bonding and Insurance Company, a corporation organized and existing under the laws of the State of Massachusetts, and duly licensed to transact business in the State of California, is held and firmly bound under the Defendant in the above-entitled suit in the penal sum of Two

Hundred Fifty & No/100 Dollars (\$250.00), and the sum of Three Thousand Six Hundred Twenty-Seven and 29/100 Dollars (\$3,627.29) (totalling Three Thousand Eight Hundred Seventy-Seven and 29/100 Dollars = \$3,877.29) to be paid to said Defendant, its successors and assigns, for which payment will and truly to be made, the Massachusetts Bonding and Insurance Company binds itself, its successors and assigns firmly by these presents.

Sealed with our seals and Dated this 19th day of May, A.D. 1950.

The Condition of the above obligation is such that

Whereas the said Plaintiff, Day-Brite Lighting, Inc., is about to take an appeal to the United States Court of Appeals for the Ninth Circuit to reverse a judgment and decree made, rendered, and entered on the 12th day of April, 1950, by the United States District Court for the Southern District of California, Central Division, in the above-entitled cause, which judgment provided that Ruby Lighting Corporation, Defendant, should recover from Day-Brite Lighting, Inc., Plaintiff, attorneys' fees in the sum of Three Thousand & No/100 Dollars (\$3,000.00) and costs taxed in the sum of Three Hundred Eighty-nine and 99/100 Dollars (\$389.99). [39]

Now Therefore, the condition of the above obligation is such that, if Day-Brite Lighting, Inc., Plaintiff, shall prosecute its said appeal to effect, and if it satisfy said judgment together with costs, interest, and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and if it satisfy in full such modification

of the judgment and such costs, interest, and damages as the Appellate Court may adjudge and award, then this obligation shall be void; otherwise to remain in full force and effect.

MASSACHUSETTS BONDING AND INSURANCE COMPANY.

[Seal] By /s/ WALKER B. SEABORN,
Attorney-in-Fact.

Examined and Recommended for Approval as
Provided in Rule 8.

CARR & CARR & GRAVELY,
JOSEPH J. GRAVELY.

HARRIS, KIECH, FOSTER &
HARRIS,
WARD D. FOSTER,
JACK BARRY, JR.,

By /s/ WARD D. FOSTER,
Attorneys for Plaintiff.

I hereby approve the foregoing bond.

Dated: At Los Angeles, California, this 26th day
of May, 1950.

/s/ JAMES M. CARTER,
Judge.

State of California,
County of Los Angeles—ss.

On this 19th day of May in the year one thousand nine hundred and 50, before me Catharine V. Wilson, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Walker B. Seaborn, known to me to be the duly authorized Agent and Attorney-in-Fact of the Massachusetts Bonding and Insurance Company, the corporation whose name is affixed to the foregoing instrument; and duly acknowledged to me that he subscribed the name of the Massachusetts Bonding and Insurance Company thereto as Surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ CATHARINE V. WILSON,
Notary Public in and for Said
County and State.

[Endorsed]: Filed May 26, 1950.

[Title of District Court and Cause.]

ORDER STAYING JUDGMENT FOR AT-
TORNEYS' FEES AND TAXED COSTS

Plaintiff by its counsel having applied to this Court for a writ of supersedeas to stay the judg-

ment that Defendant shall recover from Plaintiff attorneys' fees in the sum of Three Thousand Dollars (\$3,000.00) and costs taxed in the sum of Three Hundred Eighty-nine and Ninety-nine/100 Dollars (\$389.99), entered in this action on April 12, 1950, pending the appeal of said Plaintiff from said judgment; and the Court being fully advised in the premises, in consideration thereof;

It Is Hereby Ordered and Decreed:

That the said judgment for the payment by Plaintiff to Defendant of attorneys' fees in the sum of Three Thousand Dollars (\$3000.00) and of costs taxed in the sum of Three Hundred Eighty-nine and Ninety-nine/100 Dollars (\$389.99) be, and it hereby is, [41] suspended and stayed pending the determination of said appeal or until order of Court upon the condition that the Plaintiff file herein with the Clerk of this Court, on or before May 26, 1950, a good and sufficient bond in the sum of Three Thousand Six Hundred Twenty-seven and Twenty-nine/100 Dollars (\$3,627.29) (in addition to the Two Hundred Fifty Dollar [\$250.00] cost bond on appeal) conditioned for the satisfaction of said judgment together with costs, interest, and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed and to satisfy in full such modification of the judgment and such costs, interest, and damages as the Appellate Court may adjudge and award; the Court reserving the right to increase the amount of the supersedeas bond for sufficient cause shown.

Dated: At Los Angeles, California, this 26th day of May, 1950.

/s/ JAMES M. CARTER,
Judge.

The foregoing order is consented to and approved as to form, this 16th day of May, 1950.

C. A. MIKETTA,
WILLIAM W. GLENNY,

By /s/ C. A. MIKETTA,
Attorneys for Defendant.

[Endorsed]: Filed May 26, 1950. [42]

[Title of District Court and Cause.]

STIPULATION AND ORDER RE EXTENSION
OF TIME FOR FILING RECORD ON AP-
PEAL AND DOCKETING APPEAL

It Is Hereby Stipulated, by and between the parties to the above-entitled cause, through their respective counsel and subject to the approval of the Court, that the time within which the record on appeal may be filed and the appeal docketed in the Court of Appeals may be extended to and including August 8, 1950.

Dated: At Los Angeles, California, this 5th day of June, 1950.

CARR & CARR & GRAVELY,
JOSEPH J. GRAVELY.

HARRIS, KIECH, FOSTER &
HARRIS,

WARD D. FOSTER,
JACK BARRY, JR.,
By /s/ WARD D. FOSTER,
Attorneys for Plaintiff.

C. A. MIKETTA,
WM. W. GLENNY,
By /s/ C. A. MIKETTA,
Attorneys for Defendant.

Approved and It Is So Ordered, this 7th day of
June, 1950.

/s/ PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed June 7, 1950. [43]

[Title of District Court and Cause.]

CONCISE STATEMENT OF PLAINTIFF-AP-
PELLANT'S POINTS ON APPEAL PUR-
SUANT TO F.R.C.P. 75(d)

Now comes the Plaintiff-Appellant, Day-Brite Lighting, Inc., and, in accordance with Rule 75(d) of the Federal Rules of Civil Procedure, makes the following concise statement of points on which it intends to rely for appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment made and entered April 12, 1950, in this cause:

(1) The Court erred in holding that United States Letters Patent No. D-138,990 are limited to the specific zigzag design in the lower portion of

the end of a lighting fixture as shown in the drawings forming a part of said Letters Patent and in failing to hold that said Letters Patent are valid as covering the ornamental design for a louvered fluorescent lighting fixture as shown and described in said Letters Patent. [44]

(2) The Court erred in holding that United States Letters Patent No. D-143,641 are limited to the specific longitudinally extending V-shaped louver provided with a longitudinal bottom bead of circular cross-section shown in the drawings of said Letters Patent and in failing to hold that said Letters Patent are valid as covering the ornamental design for a louvered fluorescent lighting fixture as shown and described in said Letters Patent.

(3) The Court erred in holding that Defendant, Ruby Lighting Corporation, has not infringed United States Letters Patent No. D-138,990 and erred in failing to hold that Defendant has infringed said Letters Patent.

(4) The Court erred in holding that Defendant, Ruby Lighting Corporation, has not infringed United States Letters Patent No. D-143,641 and erred in failing to hold that Defendant has infringed said Letters Patent.

(5) The Court erred in holding that Defendant, Ruby Lighting Corporation, had not performed and was not guilty of acts of unfair competition and in failing to hold that Defendant had performed and

was guilty of acts of unfair competition with Plaintiff.

(6) The Court erred in failing to hold that Plaintiff, Day-Brite Lighting, Inc., by the expenditure of much effort and money, over a long period of time, in advertising and acquainting the trade and purchasing public with fluorescent lighting fixtures subject of the patents in suit and manufactured by it, and by the extensive sales of such fluorescent lighting fixtures to the trade and public, has created a market and demand for said fluorescent lighting fixtures of Plaintiff's manufacture and a recognition by the trade and public of said fluorescent lighting fixtures and their merit and dependability by their appearance, and a recognition by the trade and public of the distinctive [45] appearance of said fluorescent lighting fixtures and the non-functional ornamental attributes thereof and the secondary significance and meaning of such distinctive appearance and attributes, as indicating origin in and manufacture by Plaintiff, and in failing to hold that Defendant, Ruby Lighting Corporation, by its manufacture and sale of fluorescent lighting fixtures having said distinctive appearance and said attributes thereof, has appropriated the market and demand of the trade and public for Plaintiff's said fluorescent lighting fixtures and has caused confusion in the minds of the trade and public between the fluorescent lighting fixtures of Plaintiff and those of Defendant and has competed unfairly with Plaintiff.

(7) The Court erred in holding that Defendant,

Ruby Lighting Corporation, should recover from Plaintiff, Day-Brite Lighting, Inc., its attorneys' fees in the sum of Three Thousand Dollars (\$3,000.00), or any other sum, and its taxable costs and disbursements, and in failing to hold that Plaintiff should recover from Defendant reasonable attorneys' fees and its taxable costs and disbursements.

Dated: At Los Angeles, California, this 29th day of June, 1950.

CARR & CARR & GRAVELY,
JOSEPH J. GRAVELY.

HARRIS, KIECH, FOSTER &
HARRIS,
WARD D. FOSTER,
JACK BARRY, JR.,

By /s/ WARD D. FOSTER,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 30, 1950. [46]

In the District Court of the United States for the
Southern District of California, Central Division

No. 8381-C Civil

DAY-BRITE LIGHTING, INC., a Corporation,
Plaintiff,

vs.

RUBY LIGHTING CORPORATION, a Corpora-
tion,

Defendant.

Honorable James M. Carter, Judge Presiding

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Tuesday, February 28, 1950

Appearances:

For the Plaintiff:

HARRIS KIECH, FOSTER & HARRIS, By
WARD D. FOSTER, ESQ., and
JACK BARRY, JR., ESQ.,
417 South Hill Street,
Los Angeles 13, California, and
CARR & CARR & GRAVELEY,
Of Counsel.

For the Defendant:

CASIMIR A. MIKETTA, ESQ.,
WILLIAM W. GLENNY, ESQ., and
KNIGHT, GITELSON & ASHTON,
Of Counsel.

I wish at this time, your Honor, to offer in evidence a copy certified by the United States Patent Office of the file wrapper and contents of patent in suit No. 138,990, as Plaintiff's Exhibit 3, and a similar certified copy of the other design patent in suit, No. 143,641, as Plaintiff's Exhibit 4. They bear upon the back a notary's reference to an exhibit number, because they were used in depositions.

The Court: These are the file wrappers?

Mr. Foster: Those are the file wrappers and contents, your Honor.

The Court: They will be received into evidence as Plaintiff's 3 and 4. [25*]

* * *

At the same time, your Honor, and pursuant to the stipulation, I will offer the Biller patent 2,411,952 as Plaintiff's Exhibit 5.

The Clerk: Are you offering it in evidence?

Mr. Foster: Yes.

The Court: It will be received in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 5 and was received in evidence.)

Mr. Foster: That is the same Mr. Biller who has one of the design patents in suit.

The Court: This is a mechanical patent?

Mr. Foster: Yes. I wanted to show your Honor that in an attempt by this patent law firm in St. Louis to provide all possible assurance that their investment was justified in this new fixture for the

plaintiff, they applied for a mechanical patent upon
sofe of the machanical elements of this fixture.

* * * But all that was new mechanically in this
fixture, as contrasted with design, was the specific
combination of specific elements and the manner in
which they mechanically interlocked and were as-
sembled. [27]

* * *

Mr. Foster: I now offer the volume of prior
patents marked Exhibit 10, for identification, as
our exhibit of the same number. [35]

The Court: Any objection?

Mr. Miketta: The only objection I shall make
is that the heading of Plaintiff's Exhibit 10, for
identification, be changed. "Prior Art Designs" is
perfectly all right, but the words "Defendant May
Have Copied Without Infringement" is a conclu-
sion, and I think should not appear on this exhibit.

* * *

The Court: Let's strike out on Exhibit 10 every-
thing other than "Prior Art Designs."

* * *

The Court: No. 10, therefore, will be received
in evidence. [36]

(Thereupon the document heretofore marked
Plaintiff's Exhibit 10 was received in evidence
and the "Table of Contents" thereof is in the
words and figures as follows, to wit:)

Table of Contents

A—1,293,594—Willey	
B—2,339,010—Greenwald	
C—2,364,992—Maurette	
D—D-112,634—Devol	
E—D-119,794—Robinson	
F—D-119,810—Segil	
G—D-120,913—Hirsh	
H—D-122,145—MacCarthy	
I—D-122,156—Biller	
J—D-122,581—Arakelian	
K—D-122,582—Biller	
L—D-122,694—Rubinstein	
M—D-122,709—Korengold	
N—D-122,861—Carter	
O—D-122,887—Beals	
P—D-122,909—Stern	
Q—D-123,048—Doane	
R—D-123,049—Doane	
S—D-123,067—Rubinstein	
T—D-124,527—Dreyfuss	
U—D-124,888—Callahan	
V—D-125,091—Miles [37]	

W—D-127,596—Walsh

X—D-127,685—MacCarthy

Y—D-127,823—Biller

Z—D-127,914—Scribner

AA—D-128,478—Carter

AB—D-128,968—Scribner

AC—D-129,726—Scribner

AD—D-130,256—Scribner

AE—D-130,449—Weber

AF—D-130,656—Carter

AG—D-130,745—Mausshardt

AH—D-130,809—Waltman

AI—D-130,810—Baker

AJ—D-131,199—Mitchell

AK—D-131,478—Koegel

AL—D-131,532—Naysmith

AM—D-131,845—Biller

AN—D-132,786—Netting

AO—D-133,214—Ohm

AP—D-133,216—Parlato

AQ—D-133,986—Gordon

AR—D-134,079—Gordon

AS—D-134,080—Gordon

AT—D-134,081—Gordon

AU—D-136,453—Masterson

AV—D-136,797—Mareck [38]

Mr. Foster: Under the same stipulation, I offer the volume marked “Prior Art Designs From Catalogs” as Plaintiff’s Exhibit 9.

The Court: We will strike everything after the word “Catalogs,” so that it will read “Prior Art Designs From Catalogs,” and No. 9 will be received in evidence.

(Thereupon the volume heretofore marked Plaintiff’s Exhibit 9 was received in evidence and the “Table of Contents” thereof is in the words and figures as follows, to wit:)

Table of Contents

A—1941 Ruby Catalog “Fluorescent Lighting”

B—Illuminating Engineering, Vol. XXXVI, No. 2 (Feb., 1941)

C—Illuminating Engineering, Sept., 1942, and particularly pages 466 and 472

D—Illuminating Engineering, March, 1943, and particularly pages 130 and 131

E—Illuminating Engineering, April, 1943, and particularly pages 168 and 169

F—Catalog No. 38 of The Edwin F. Guth Co. (March 1, 1941) and particularly pages 7, 18, 19 and 23

G—The Magazine of Light, No. 9 issue, 1940, article entitled “A Review of Fluorescent Luminaire Design”

H—Garcy Challenger [39]

Mr. Foster: Now I have an oral stipulation, your Honor, covering the Plaintiff's patented design which is upon the standard here, and which when your Honor opened court this morning was lighted. That design is suspended from the standard because we hope that to an observer seated on the floor of the court room it would approach in location a fixture hinged to or suspended a short distance below the ceiling. Of course, to your Honor on the bench it does not have that appearance because the bench is elevated. But that fixture, which is of plaintiff's manufacture, has been seen by defendant's counsel, and we offer it in evidence as the commercial embodiment of the plaintiff's patented design as plaintiff's next in number.

The Court: Plaintiff's Exhibit 13. It will be received in evidence.

* * *

Mr. Foster: We have two fixtures of the defendant's manufacture, one of them given to us by the defendant, and I offer as Plaintiff's Exhibit 14 the smaller of those two accused fixtures. [40]

* * *

Mr. Foster: The smaller one is offered as Plaintiff's Exhibit 14. There are two sizes, your Honor,

because one of them takes two fluorescent tubes, and one of them takes four for a greater degree of light.

Mr. Miketta: The defendant will stipulate that both of these fixtures are of its manufacture, your Honor.

Mr. Foster: And were sold, Mr. Miketta, in the Southern District of California, Central Division, prior to the filing of the complaint, for jurisdictional reasons?

Mr. Miketta: That that is the same type of fixture that was sold?

Mr. Foster: Yes.

Mr. Miketta: So stipulated.

* * *

The Court: 14 will be the smaller. And the larger one?

Mr. Foster: The larger one as Plaintiff's Exhibit 15.

The Court: They will be received in evidence pursuant to the stipulation of counsel. [41]

* * *

Los Angeles, California

Tuesday, February 28, 1950, 2:30 P.M.

The Court: Proceed.

* * *

Mr. Foster: And may the record show that we have had a lamp up here on the stand all morning from 10:00 to 11:40, and lighted for about the first five or ten minutes. I wanted to ask the permission

of the court to move it during the afternoon. Your Honor saw it this morning, and saw it lighted. Can you see a little of the end plate from up there?

The Court: Where are you going to move it to?

Mr. Foster: I am going to move it out of the way for witnesses to go back and forth.

Can you see a little of the end plate, your Honor? [54]

The Court: Yes, I can see a little bit. Do you want to turn the light on again?

Mr. Foster: No. I just wanted you to see it there.

I notice that the clerk has tagged it. It is about 20 feet from the judge's bench, perhaps, and 15 feet from the clerk. You have tagged this as Plaintiff's Exhibit 13 as the plaintiff's lamp. Is that correct, Mr. Clerk?

The Clerk: Yes.

Mr. Foster: May the record show that the clerk has been here all during the morning session? He did not know that the lamp now on the standard is not the plaintiff's lamp, but has so labeled it, although it is the defendant's lamp.

Had your Honor noticed that difference? Does your Honor notice that this is a different lamp than the one this morning? Your Honor hadn't remarked about it, and it is perhaps an unfair question. But I assure your Honor that I was not in cahoots with the clerk in having it marked this way.

The Court: You mean you are not referring to the standard or to the ceiling plate, but that the

lamp is a different one than was up there this morning?

Mr. Foster: Yes, your Honor. Does that surprise you?

I think it fair to state for the record that the clerk did not observe any difference although he was two hours in [55] court this morning, and of his own volition and at no suggestion from plaintiff's counsel he has seen fit to label this lamp Plaintiff's Exhibit 13 when he came in at 2:00 o'clock, whereas Plaintiff's Exhibit 13 is over there on the bench, and the exhibit up here on the standard which he sought to label is Plaintiff's Exhibit No.—

The Court: 14 or 15?

Mr. Foster: 14, which is the defendant's lamp.

The Clerk: You just removed the top of the standard?

Mr. Foster: Yes. And, of course, at the appropriate time I will urge that the appropriate test of infringement is that of the casual observer, and that as the casual observer the clerk observed the lamp this morning for two hours and couldn't tell the difference.

The Clerk: Should that tag be removed from the standard and put on the lamp over there?

Mr. Foster: Yes, sir.

The Court: You don't have to do it now, Mr. Clerk.

The Clerk: All right.

Mr. Miketta: I am quite sure that the change of the lamp was completely inadvertent.

Mr. Foster: No. We intended to change them,

but we didn't plan with the clerk that he would mark them erroneously. [56]

* * *

Mr. Miketta: Now, I believe plaintiff will stipulate that they did not invent the fluorescent tube.

Is that correct, Mr. Foster?

Mr. Foster: Yes. [60]

* * *

BERTRAM A. KAEPPEL

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Foster:

Q. Will you state your full name, please, Mr. Kaepfel.

A. Bertram A. Kaepfel, K-a-e-p-p-e-l. [70]

Q. And your age, please, Mr. Kaepfel?

A. My age is 42.

Q. And your residence?

A. 5354 Delmar Avenue.

Q. What city?

A. St. Louis, Missouri.

Q. You are the Mr. Kaepfel who was one of the patentees named in each of the design patents here in suit?

A. Yes, I am.

Q. You are employed by Day-Brite Company, the plaintiff here?

A. Yes.

Q. Did you have any experience prior to your

(Testimony of Bertram A. Kaepfel.)

employment by the plaintiff in designing any appliances or apparatus?

A. Yes, sir. Shall I enumerate them?

Q. If your please.

A. From 1924 to 1928 I worked for the Busch Sulzer Brothers Diesel Engine Company as a draftsman.

* * *

A. (Continuing): In the year following that, for the American Cotton Picker Company. Do you want me to go on [71] from there?

Q. (By Mr. Foster): Yes.

A. For four years following that I was on a farm, and then two years out of work due to ill health.

Q. How long have you been with the Day-Brite Lighting, Inc.?

A. From October 21, 1935, continuously.

Q. All of your work for the Day-Brite Lighting, Inc., has been in their engineering department, is that correct?

A. Yes, sir.

Q. Your work now is that of a tool engineer and designer, is that true?

A. Yes, sir.

Q. Have you participated in the making of any inventions other than those of the two patents here in suit, Mr. Kaepfel?

A. I have participated in others where patent has been applied for but not as yet granted.

Q. The two patents in suit represent the only inventions you have participated in where a patent has been issued, is that correct?

A. Yes, sir.

(Testimony of Bertram A. Kaepfel.)

Q. Approximately when was the commencement of your work on making the designs of the two patents in suit?

A. That would have been prior to February, 1943, to [72] the best of my memory.

Q. What was the original purpose that you had in mind when you commenced work upon this design?

A. The original purpose would have been to produce a fixture which would be readily stockable on the part of all distributors and dealers, it would be readily producible in the shop, and would have the pleasing appearance that would make it salable.

Q. Now, those purposes of having a fixture that would be readily stocked and readily produced in the shop are purposes had in mind in the manufacture of all commercial devices to be sold, isn't that true, within your experience? A. Yes, it is.

Q. But you had as a purpose here, also, in making the designs of the patent in suit, providing a fixture that was of a pleasing eye appeal so that it would be sold, if I understand you, is that right?

A. Yes, that is of primary importance. A fixture that is not appealing to the eye will not sell.

Q. Was your purpose in working upon the design of the fixtures of the patents in suit to provide such a pleasing appearance to the fixture that it would become a best seller with the company? [73]

* * *

(Testimony of Bertram A. Kaepfel.)

The Witness: The plain answer is yes, it was. [74]

* * *

Q. (By Mr. Foster): In your work upon the design of the two patents in suit, were any sketches or drawings of fixture [75] designs made?

A. Yes, there would be very many sketches made.

Q. Did you have anything to do with making those sketches or drawings in the development of the designs of the patents in suit?

A. Yes, sir, I made them personally.

Q. You say a great many. How many were made, if any, before the final design of the patents in suit was reached?

A. That is a difficult question to answer because many of these sketches would be destroyed as we progressed in our design. I would say certainly several dozen.

Q. Is my understanding correct that as the sketch of a design was superseded by a subsequent one, those superseded sketches were not always retained? Is that true? A. That is true.

Q. Have you made an examination of the company files to search for sketches of those preliminary designs which might have happened to be retained?

A. Yes, sir, I believe the first one is dated May, 1943.

Q. I show you a copy of Plaintiff's Exhibit 1, containing five drawings tabbed A to E; are those

(Testimony of Bertram A. Kaepfel.)

the drawings which you found as a result of that search? A. Yes, sir.

Q. That is Plaintiff's Exhibit 1, for identification. [76] Would you carefully examine each of the five drawings in Plaintiff's Exhibit 1 for identification and state who made the originals of those drawings?

A. Yes, sir; I made every one of them.

Q. When were those drawings tabbed A to E inclusive of Plaintiff's Exhibit 1 for identification made by you with respect to the dates which they bear?

A. They would have been made within a few days prior to the date on the drawing.

Q. The date appearing upon each of these five drawings in Plaintiff's Exhibit 1, for identification, is in your hand? A. Yes, sir.

Q. It was your custom, as I understand you, to date these drawings so made by you at or within a day or two after your completion of the drawing, is that correct? A. That is correct.

Q. And have the originals of these drawings A to E of Plaintiff's Exhibit 1, for identification, been in the files of Day-Brite in the engineering department since they were made until removed for printing by you?

A. Yes, sir, since that date. [77]

* * *

Q. (By Mr. Foster): And have any changes or additions been made in these drawings since the dates which they bear respectively?

(Testimony of Bertram A. Kaepfel.)

A. No, sir, there have not.

Q. Will you refer briefly to these drawings successively and give us a short description of what is there contained as regards the finished design of the patents in suit? [78] Refer first to the drawing which is dated 5-20-43, tab A of Plaintiff's Exhibit 1, for identification.

A. The drawing dated 5-20-43 is a free-hand cross-section through the chassis of the fixture. It shows the ballast and the lamp holder sketched in place with a suggestion for joining the two components.

Q. Would you refer to tab B, the next drawing, dated 3-28-44, and describe what is there generally disclosed?

A. That drawing shows, perhaps, the first concrete suggestion for a completed fixture. It indicates the elements of the design as they were taking shape at that time.

Q. I note that in the center of tab B of Plaintiff's Exhibit 1, for identification, there is in the right-hand side of the center view a representation that appears to be part of the end plate, is that correct?

A. Yes, sir.

Q. And I notice that in the lower portion of the right-hand half of the center view there appears to be an ornamentation of the end cap or plate, is that correct?

A. Yes, sir, that is the way it was originally conceived.

Q. But I notice that ornamentation in the lower

(Testimony of Bertram A. Kaepfel.)

right half of the central view of tab B does not have an outline around it tying it to the ornamentation on the other half. Was that conceived of at that time? [79]

A. Not at the time that this drawing was made. That followed later.

Q. And this drawing was made 3-28-44?

A. Yes, sir.

Q. I note on the right-hand edge of tab B of this drawing a representation. What is there shown? Is that the side section of the fixture?

A. That is what is known as an elevation at the center of the fixture indicated by a broken line separating the end from the center.

Q. Then this vertical line is the center of the side of the fixture, is that correct?

A. Yes, that is the center.

Q. And does that view on the right of tab B drawing of Plaintiff's Exhibit 1, for identification, indicate that there was to be centrally disposed on each side of the fixture three rectangular panels?

A. Yes, sir.

Q. Decorative panels. Is there any indication on tab B of the spacing of the louvers, transverse louvers?

A. Yes, at the left-hand side of the drawing there is an indication of the number of transverse louvers to be applied throughout the fixture.

Q. Does this left-hand view of tab B illustrate to scale how far apart the transverse louvers are spaced? [80]

(Testimony of Bertram A. Kaepfel.)

A. Yes, by scaling the original drawing we knew exactly what that dimension was to become.

Q. And there is indicated in the left-hand view the overall length of the fixture?

A. Yes, sir.

Q. So that from the scale distance of the transverse louvers shown on tab B and the overall length you knew there were how many transverse louvers to be there?

A. Yes, we knew there would be 13 transverse louvers.

* * *

Q. (By Mr. Foster): Will you, Mr. Kaepfel, refer to the drawing? In the lower left I notice a dimension line 48-7/16 inches. Is that the overall length of the louver?

A. That was the overall length of the fixture. And then by scaling this drawing we knew exactly what that spacing would become.

The Court: I know, but is there anything on this drawing to show that there couldn't have been 15 louvers or 20 louvers? [81]

The Witness: Yes, sir. The distance from the end to the first louver, or the first louver to the second louver, would have been——

The Court: Where is the distance from the end of the first louver shown?

The Witness: The transverse louver is indicated by the long shaded vertical line.

The Court: The first louver?

(Testimony of Bertram A. Kaepfel.)

The Witness: Yes, that is the first transverse louver.

The Court: You show no distance of that louver from the end?

The Witness: That's right. The dimension was not put in there at that time because this was a discussional drawing and a drawing for making up a sample to be mounted and viewed and criticized.

Mr. Foster: But it is a scale drawing, is it?

The Witness: It is drawn to scale. [82]

* * *

Q. (By Mr. Foster): Will you refer to drawing tab C of Plaintiff's Exhibit 1, for identification, dated 5-18-44, and describe briefly what is there disclosed?

A. The drawing 5-18-44 shows another step in the development of this design. By this time we have reached the thought of a V-shape central longitudinal louver, we have unified the design in the end of the fixture, we have altered the end cover and have pretty well stabilized the contours or outline of the fixture.

Q. Mr. Kaepfel, the record will not show where you have pointed. When you say that you have unified the design in the end cap, by that do you mean that you have placed around the decorative pattern in each of the lower halves of the end cap an outline which contains them both? [83]

A. Yes, sir, that is correct.

Q. As shown in this drawing?

A. Yes.

* * *

(Testimony of Bertram A. Kaepfel.)

Q. (By Mr. Foster): When you say that you have reached a central triangular configuration, you are pointing to the one half of the triangle in the lower center right-hand side of the central view?

The Court: Shown by the letter C?

Q. (By Mr. Foster): Shown by the letter C, that is the V-shaped longitudinal louver?

A. Yes, sir.

Q. And the upper part of the end plate you are referring to is shown in the right-hand half of the central view?

A. That is correct.

Q. Would you describe briefly what is shown in the next drawing, tab E of Plaintiff's Exhibit 1, for identification, dated 7-3-45? [84]

* * *

Q. 6-22-44 is the date of Exhibit D.

The Court: This looks like 6-23 to me. You have got one date written in pencil above—pardon me. It is 6-22-44.

A. This drawing shows the final design of the enclosure. On this one everything has been stabilized and is ready for production.

Q. And the two side views on the left and right are fragmentary side elevational views of the composite fixture, is that correct?

A. Yes, sir.

Q. Referring to tab E of Plaintiff's Exhibit 1, for identification, dated 7-3-45, please describe generally what is there shown?

A. That drawing shows the same enclosure, but it is now a complete fixture by virtue of the fact

(Testimony of Bertram A. Kaepfel.)

that it is mounted on the chassis which contains all the remaining components.

Q. Does it show anywhere the central V-shaped longitudinal louver?

A. Yes, sir, it shows that longitudinal louver and shows the final profile of the transverse louvers also.

Q. That is shown in the left-hand half of the central view, is that correct? [85]

A. Yes, sir.

Q. And it shows the decorative pattern in the lower portion of the end cap that is being shown on the right-hand half of the central view?

A. Yes.

Q. And the pattern and the top of the end cap is shown in the top of the right-hand half of the central figure, is that true?

A. Yes, sir.

Q. Are any of the transverse baffles illustrated there outlined?

A. Yes, in the left-hand lower cross-section of the fixture.

Q. And the central figure?

A. Yes.

The Court: Marked 7?

The Witness: 7, yes, sir.

Q. (By Mr. Foster): And is that transverse louver shown, the edge of it, anywhere in the left-hand view?

A. It is shown in one location in the left-hand view.

Q. That is the edge of the transverse louver we see there?

A. Yes, sir.

(Testimony of Bertram A. Kaepfel.)

Mr. Foster: These tabs A, B, C, D, and E, which the witness has identified as being made by him and produced from the [86] files of the company are offered in evidence as Plaintiff's Exhibits 1-A to -E respectively.

The Court: They will be received into evidence as Plaintiff's Exhibit 1 with the subdivisions A to E inclusive.

(Thereupon the document marked Plaintiff's Exhibit 1-A to 1-E, for identification, was received in evidence and the "Index" thereof is, in words and figures, as follows, to wit:

("Preliminary Drawing dated 5-20-43—A

("Drawing dated 3-28-44—B

("Drawing dated 5-18-44—C

("Drawing dated 6-22-44—D

("Drawing dated 7-3-45—E.")

The Court: We will take a short recess at this time, about five minutes.

(Short recess.) [87]

* * *

The Court: You do not contend that the number of hours put in would indicate the spark of genius, do you?

Mr. Foster: No, your Honor.

* * *

Q. (By Mr. Foster): This first drawing, Plain-

(Testimony of Bertram A. Kaepfel.)

tiff's Exhibit 1-A, dated 5-20-43, is that the first drawing that was made in developing the designs of the patents in suit?

A. By no means. There were many drawings before that.

Q. But is this the first one you were able to find that was retained? A. Yes, sir. [88]

The Court: The first drawing there, A in Exhibit 1, that is the internal holder, is it not?

The Witness: Yes, sir. That was the chassis for the fixture.

The Court: And the rest of it comes around the outside of it?

The Witness: Yes, sir.

Q. (By Mr. Foster): Is that true likewise of the periods of time between the dates of the successive drawings, of tabs A to E in Plaintiff's Exhibit 1, that there were a number of other drawings made between them and discarded?

A. Yes, that would be true in all cases. [89]

* * *

Q. (By Mr. Foster): Did Mr. Biller at Day-Brite Lighting, Inc., also meet with you during the period from this first drawing, 5-20-43, to the final drawing, 7-3-45 in Plaintiff's [90] Exhibit 1?

A. Yes, Mr. Biller and I worked very closely together. There were many discussions. Every time there would be a new scope of drawing, we would talk about it and criticize it very freely.

Q. And where did those meetings take place?

(Testimony of Bertram A. Kaepfel.)

A. In the engineering department at my drafting table.

Q. Were any of these drawings, tabs A, B, C, or D, of Plaintiff's Exhibit 1 utilized in the shop to make any models or mock-ups?

A. Yes, sir. As soon as we had a drawing that was capable of being produced in metal, we always made a sample in order to get the third dimensional aspect.

Q. Were they called mock-ups?

A. Mock-ups, yes, sir; samples or mock-ups.

Q. Was any mock-up ever made of the drawing tab A, dated 5-20-43?

A. No, sir, not of that one drawing alone.

Q. Of tab B of Plaintiff's Exhibit 1?

A. Yes, I am very sure there was a sample or mock-up of that drawing.

Q. When with respect to its date, 3-28-44?

A. The sample would probably be available to us within a month after that date.

Q. Of what other drawings, tabs C, D and E of Plaintiff's Exhibit 1, were mock-ups made?

A. Of all of them except the last drawing. By that time, why, the design was stabilized.

Q. Those mock-ups were made in the shops of Day-Brite Lighting, Inc.; is that true?

A. Yes, sir.

Q. And they were observed by you, and criticized, were they? A. Yes, sir.

Q. That is, when they were observed, do you mean the appearances of them were observed?

(Testimony of Bertram A. Kaepfel.)

A. The fixture was mounted in a position on the ceiling where it could be freely criticized by both Mr. Biller and myself, and the other engineers.

Q. Did the discussions relate to anything other than the lighting efficiencies of these designs?

A. We never checked the lighting efficiency at that stage. At that stage we were interested only in appearances.

Q. What was done with these mock-ups, these three or four mock-ups of the designs shown in Plaintiff's Exhibit 1, after they were made?

A. The mock-ups were retained until we were completely tooled for production.

Q. I notice upon Plaintiff's Exhibit 1-C the longitudinal V-shaped louver has a circular bead shown on its lower [92] end. Was such a circular bead ever used in Day-Brite fixtures?

A. Yes, it was used originally for about a year in actual production.

Q. What was the reason for the existence of that bead on the V-shaped louver?

A. The bead came into—was used in production for fastening the ends of the fixture to the longitudinal louver by means of a thread-cutting screw through the end plates.

Q. Did that circular bead on the V-shaped longitudinal louver contribute to its appealing appearance, in your opinion?

A. No, sir.

Q. It was for utility, as I understand you?

A. Yes, sir.

Q. After it had been used for a period of time

(Testimony of Bertram A. Kaepfel.)

on the Day-Brite commercial fixtures, as I understand your testimony the circular bead was eliminated? A. Yes, sir.

Q. Was that circular bead observable?

A. Yes, sir.

Q. When the longitudinal louver was employed, you could see it when it was used, could you?

A. Yes, sir, if you looked at it closely. [93]

* * *

Q. (By Mr. Foster): I direct your attention to the drawing, tab D of Plaintiff's Exhibit 1, and, again, to the longitudinal louver, the V-shaped louver. I notice there is illustrated at its upper end a little flange. Did that, in your opinion, contribute to the pleasing design or appearance of the fixture?

A. No. That was added as a stiffening member.

Q. That was a utility feature, as I understand it?

A. Yes, sir.

Q. Was that visible when the composite fixture was assembled by an observer beneath it?

A. No, sir, that would not be visible from below.

Q. And as regards the last drawing, tab E of Plaintiff's Exhibit 1, you had reached, as I understand you, the final design as regards the angle of the parts, and the slopes, and the over-all composite ornamental appearance of the patented design; is that correct?

A. Yes, sir, that is the design as frozen.

The Court: What date did you reach that final design? [94]

(Testimony of Bertram A. Kaepfel.)

The Witness: The drawing is dated 7-3-45.

Q. (By Mr. Foster): Now, were all of the changes represented in the various forms of the design in Plaintiff's Exhibit 1 approved by both you and Mr. Biller before they were made?

A. Yes, Mr. Biller was always consulted before any changes were made.

Mr. Foster: Now, that Plaintiff's Exhibit 1, your Honor, reflects, as the witness has shown, all of the drawings we could find of the development of the design to the perfected form shown in the design patents.

I now wish to direct his attention to Plaintiff's Exhibit 2, which is the work involved in preparing to manufacture the patented design commercially.

The Court: You say Plaintiff's Exhibit 1 is all of the drawings that concerned both of the design patents?

Mr. Foster: Yes, your Honor. One of the design patents is a sub-combination of the composite shown.

The Court: Which patent was the combination patent and which was the sub?

Mr. Foster: The sub-combination patent is 143,641, the patent on the longitudinal and transverse louvered assembly, and the design patent 138,990 is upon the entire combination, in the first one.

The Court: The first one was the combination?

Mr. Foster: Yes, sir.

The Court: And the second patent was on a part of the matter?

(Testimony of Bertram A. Kaepfel.)

Mr. Foster: True, your Honor. The '641 patent, the latter issue, was filed July 28, 1944, and the '990 patent, the earlier issue, was filed July 29, 1944. I don't know why one day elapsed between them, but they were directed to the same fixture, as is shown by the fact that in the '641 later issued patent the outline is in dots or a phantom showing, which is customary in a design patent drawing to show the environment of the design, which design is not covered by the design patent.

Q. (By Mr. Foster): Now, I asked you, Mr. Kaepfel, to make a search for drawings and a search relating to work done to prepare for commercial production of the fixtures of the design patents in suit. Are these drawings which are in plaintiff's Exhibit 2, for identification, those which you found in response to that request?

A. Yes, sir. They are in that binder.

Q. And found at the beginning of this Plaintiff's Exhibit 2, for identification, is a sheet entitled, "Summary of Tool Costs viz-aid fixtures," showing a total expenditure of \$59,445.67, and followed by sheets which list those expenditures, commencing in 1944 and continuing through to 3-22-48. Were those compilations prepared by you or under your direction?

A. They were prepared by me or under my direction.

Q. They are the compilations which are summarized in this total sheet of \$59,000-plus in this exhibit?

A. Yes, sir.

(Testimony of Bertram A. Kaepfel.)

Q. From what sources did you get the material compiled in these typed sheets for that total?

A. From the invoices by our die suppliers.

Q. Those invoices, in the normal course of business, pass through your hands before they are paid?

A. Yes, sir. They come to me for approval for payment.

* * *

Mr. Miketta: May the court please: I don't know what your ultimate ruling on this will be, but it seems to me that we are burdening the record and burdening the time of the court, and taking your time unnecessarily, your Honor, in talking about tool costs, where many of the tool costs, for example, as indicated by the first sheet, relate to the chassis. Now, the chassis is the tin-can that carries the socket and the tube, and has nothing to do with the design, and I am quite sure that the witness would admit that a chassis of that type has been used by other lamps. [97]

Now, the amount of money spent by them on their own tools is absolutely irrelevant and immaterial. That has nothing to do with the design. Just because they are more or less efficient in manufacturing the devices certainly does not influence either the question of validity or the question of the scope or the question of infringement.

* * *

Mr. Foster: I urge, your Honor, the materiality, of course, and I propose to ask general questions

(Testimony of Bertram A. Kaepfel.)

that will cover all of them instead of going through each in detail. But I feel it is all material as indicating that when one does, as did the plaintiff here, independently design a fixture of new appearance and then tool up to produce it commercially, instead of copying the fixture originated by another, these expenses are necessary. And I believe that the evidence will contrast such expenditures required by independent development of a design, such as the patented design, with the very small expenditures which were made by the defendant, and which I think the evidence will cause one to believe were avoided—the larger expenditures were avoided by the availability of the plaintiff's design, patented design, for imitation by the defendant. [98]

* * *

Mr. Miketta: The defendant's end-piece, for example, is just a metal casting, that is, one casting. The plaintiff's device is pressed and stamped out of two pieces of material. One is a pressed thing, and this is a single piece of casting. Just because the plaintiff elected to make dies, to use pressure, and stamped it out of two pieces of metal, whereas the defendant cast his end in one piece, which would be of much less expense, doesn't mean a thing. [99]

* * *

Now, why should we go into the question of costs, when the defendant doesn't even use that method of

(Testimony of Bertram A. Kaepffel.)

manufacture? I see no relevancy. We are just building up a record. The plaintiff is attempting to build up the case, I think, unnecessarily, and just cause us more damage.

* * *

Mr. Foster: There is another ground for its materiality, however, your Honor, and that is that we believe that the appropriation of our design, indeed, we suggest its copying is an aggravation of the damage the plaintiff has suffered from its infringement. And frequently, many times, unfair competition to an extent less than actual copying has been held material, relevant and admissible evidence as an aggravation of damages. So it is offered on that ground, also. [100]

* * *

The Court: Now, your design patent, your first patent, is a design, I take it, of the ends, the shape of the lamp housing, the shape and position of the louvers?

Mr. Foster: Yes.

The Court: All of which you claim is a part of your design?

Mr. Foster: Yes.

The Court: Now, the matter of the chassis would not have anything to do with it, would it?

Mr. Foster: True. [101]

* * *

Q. (By Mr. Foster): I now direct your atten-

(Testimony of Bertram A. Kaepfel.)

tion to the '990 section, which shows the housing outline in the lower left-hand corner. That is Fig. 2. That was a part of the composite design of the patent?

A. Yes, sir. [102]

* * *

The Court: Now, when you get all through going through Plaintiff's Exhibit 2, for identification, what is your purpose? To show you spent money?

Mr. Foster: Yes, sir.

The Court: And work in producing it?

Mr. Foster: Yes, sir, amounting to \$59,445.67, substantiated by the drawings made by this witness by his own hands on the dates they bear, and the invoices which are attached to this exhibit. We spent that amount of money to commercially produce it in the form now presented in the physical exhibit, that is, the patented design fixture. [103]

* * *

Q. (By Mr. Foster): In Plaintiff's Exhibit 2, for identification, Mr. Kaepfel, there are tabbed with the letters A to F certain summaries and tabulations of expenditures; are those a summary and tabulation of expenses made by the plaintiff company in payments out for preparation of dies and tools outside its own plant for the commercial production of the patented design fixture, that is, the design of the patents in suit?

A. Yes, sir, those are all outside die costs.

Q. Are all those summaries of tabs A to F made by you or under your direction?

A. Yes, under my direction.

(Testimony of Bertram A. Kaepfel.)

Q. And from company records kept in the ordinary course of business, is that true?

A. Yes.

Q. Also listed in these tabs and lettered with various letters from A to Z and from AA to NN, there are a number [105] of drawings which are listed upon the table of contents in the front of the book; were all of those drawings made for the purpose of having such dies and tools produced for the commercial production of the fixture of the designs of the patents in suit?

A. Yes, sir, those are all detailed drawings for die work.

Q. And were they made by you?

A. They were all made by me.

Q. Were the drawings retained from the time they were made in the files of the plaintiff company engineering department?

A. Yes, sir. They are still on file.

Q. And as to any of them which bear dates, were the drawings completed on the dates which they bear, or within a day or two thereof?

A. Yes, sir.

Q. I notice among the lettered exhibits in Plaintiff's Exhibit 2 are some invoices; are those invoices which were paid by the plaintiff company for the work relating to the invoices and represented by the drawings in Plaintiff's Exhibit 2?

A. Yes, they are.

Q. And those invoices contained in Plaintiff's Exhibit 2, for identification, are typical of all of the invoices [106] paid by the plaintiff company

(Testimony of Bertram A. Kaepfel.)

for all of the work shown in the drawings of Plaintiff's Exhibit 1, for identification?

A. Yes, they are.

Q. And is the total sum shown by the summary on sheet A of Plaintiff's Exhibit 2 for identification, being \$59,445.67, the amount actually paid by the plaintiff after the perfection of the design of the patents in suit and for the commercial production of the fixtures embodying such design in dies and tooling up to produce the commercial fixtures bearing such designs? A. Yes.

Q. And in addition was any time spent within the plant of the plaintiff for that purpose?

A. Yes.

Q. And the additional time spent in the plant of the plaintiff is not shown in your summary?

A. No.

Mr. Foster: Plaintiff's Exhibit 2 with the various tabs, drawings and summaries, and bearing the letters A through Z and AA through NN, and the table of contents of that Plaintiff's Exhibit 2, for identification, are offered in evidence as Plaintiff's Exhibit 2, with the letters for each as shown in the table of contents. [107]

* * *

The Court: Exhibit 2 is admitted into evidence.

Mr. Foster: May my offer of Plaintiff's Exhibit 1, your Honor, cover, also, the table of contents, and the reporter be asked to copy both of the tables of contents for the record?

(Testimony of Bertram A. Kaepfel.)

The Court: Yes, that will be done. However, I will say as far as your Exhibit 2 is concerned you can summarize that, as far as I am concerned, by saying that you spent money and time in developing your design.

I think when I have said that much I don't know that we get anything more from that document. Maybe you can convince me later that there is more in it than that.

(Thereupon, the exhibit marked Plaintiff's Exhibit 2, for identification, was received in evidence and the "Table of Contents" thereof is, in words and figures, as follows, to wit:)

A—Summary of Tool Costs.

B—Tabulation of 40-watt Chassis Die Costs.

C—Tabulation of 40-watt Enclosure Die Costs.

D—Tabulation of 40-watt Enclosure Die Costs
(continued).

E—Tabulation of 85-watt Chassis Die Costs.

F—Tabulation of 85-watt Enclosure Die Costs.

G—Drawing Showing Spring Catch Arrangement for Removal of Enclosure from Chassis (Scale ten times full size:)

H—Drawing Showing Side Elevation (Scale ten times full size).

I—Drawing Showing Partial Section in Plan of Spring (Scale ten times full size).

J—Drawing Showing Chassis and Chassis Cover and Related Portion of Enclosure End (Scale ten times full size).

(Testimony of Bertram A. Kaepfel.)

K—Drawing Showing Relationship of Longitudinal Louver to Transverse Louver (Scale ten times full size).

L—Drawing Showing Relationship Between Louver Panel Formation and Transverse Louver (Scale ten times full size).

M—Drawing of Side Panel Stretchout #S-18468 (Scale full size).

N—Drawing of End Insert #SW-20248 (Scale full size).

O—Atlas Invoice No. 25964.

P—Drawing of Lateral Louver #PKW-20407 (Scale full size).

Q—Atlas Invoice No. 25962.

R—Atlas Invoice No. 25965.

S—Drawing of End Cover #PKW-18598 (Scale full size).

T—Atlas Invoice No. 25963.

U—Drawing of Wiring Cover, End Notch and Perforation #PK-18569 (Full size).

V—Atlas Invoice No. 26342. [109]

W—Drawing of Longitudinal Louver Stretchout #PK-18467 (Full size).

X—Atlas Invoice No. 26341.

Y—Drawing of Socket Box #PK-18559 (Full size).

Z—Atlas Invoice No. 25957.

AA—Atlas Invoice No. 25958.

BB—Atlas Invoice No. 25959.

CC—Atlas Invoice No. 26338.

(Testimony of Bertram A. Kaepfel.)

DD—Drawing of Side Panel Stretchout #PK-20166 (Full size).

EE—Atlas Invoice No. 26340.

FF—Drawing of End Piece #PK-18283. (Full size).

GG—Omar Job No. 11201.

HH—Atlas Invoice No. 26333.

II—Atlas Invoice No. 26334.

JJ—Drawing of Long and Short Mounting Channel #PKW-20163 (Full size).

KK—Atlas Invoice No. 25960.

LL—Atlas Invoice No. 26339.

MM—Drawing of Channel Stretchout.

NN—Drawing of Channel Stretchout #PK-18475. [110]

* * *

Q. (By Mr. Foster): Mr. Kaepfel, have you made any comparisons of the dimension and design features of the Ruby Paramount accused design and the Day-Brite patented design? A. Yes, I have.

Q. Did you make any drawing comparing the appearance and dimensions of the end plates of those two fixtures?

A. Yes, sir, I have the composite drawing.

Q. I direct your attention to the drawing marked I of Plaintiff's Exhibit 11, for identification, and ask you if that is the drawing to which you refer.

A. Yes, sir, I made that drawing.

Q. Would you explain what is represented by this drawing tab I of Plaintiff's Exhibit 11, for identification, and how you made it?

(Testimony of Bertram A. Kaepfel.)

A. It was made by taking each of the fixtures in turn and tracing around the contours of the end.

Q. Upon a thin sheet of paper that you have as that exhibit, is that correct? A. Yes.

Q. Are the legends that appear upon here correct, that is, the number of the transverse louvers of both equal 13? [111] A. Yes, sir.

Q. And the overall length of both equals 48-7/16 inches? A. Yes, sir.

Q. Did you measure these angles and put the number of degrees of the angles shown on this drawing? A. Yes, sir.

Q. And the overall height of the ends of the two fixtures? A. Yes, sir.

Q. And are all of the angles and all of the dimensions shown numerically upon this drawing tab I of Plaintiff's Exhibit 11, for identification, correct within the allowance of working tolerances?

A. Yes, sir, they are.

Mr. Foster: The drawing tab I of Plaintiff's Exhibit 11, for identification, is offered into evidence as Plaintiff's Exhibit 11-I, your Honor.

The Court: It will be received in evidence, tab I of Exhibit 11.

* * *

Mr. Foster: I might state, your Honor, that as depicted upon Plaintiff's Exhibit 11-I showing only the end plates, plus the number of louvers, plus the overall length of the [112] fixture, there are seven

(Testimony of Bertram A. Kaeppel.)

identities shown by this exhibit to exist between the plaintiff's commercial patented design fixture and the defendant's accused structure. Subsequent testimony will show that it is very improbable this could have been coincidental.

Q. (By Mr. Foster): Could the dimensions shown upon that drawing to which you last referred, and the angles, have been of any other values without detracting from the utility of those fixtures?

A. Yes.

* * *

Q. (By Mr. Foster): I note that upon Plaintiff's Exhibit 11-I there is a $7\frac{1}{2}$ degree angle in the upper and lower edges of the end plates. Why was that particular angle chosen?

Mr. Miketta: That is objected to, your Honor, as calling for a conclusion.

The Court: The way the question is asked, it is very broad. Do you mean why it was chosen by this witness for use in the plaintiff's device? [113]

Mr. Foster: Yes.

Q. Why was it chosen by you, Mr. Kaeppel, for the plaintiff's end caps on their fixture?

The Court: Do you have an objection now?

Mr. Miketta: I guess not. I misunderstood the question.

The Witness: It was chosen because it is a pleasing angle, it blended in with all the other angles and lengths of sides and bottom.

Q. (By Mr. Foster): Were the $7\frac{1}{2}$ degree

(Testimony of Bertram A. Kaepfel.)

angles of the plaintiff's patented design end plate chosen because of any utility reasons?

A. No, sir.

Q. So far as you know, and so far as utility is concerned, the $7\frac{1}{2}$ degree angles could have been no angles at all but horizontal edges or angles of different value than $7\frac{1}{2}$ degrees? A. Yes.

Q. Is the same thing true of the $22\frac{1}{2}$ degree angle shown in the same exhibit?

A. Yes, sir, that is the angle of the side.

The Court: Do I understand from Plaintiff's Exhibit 11-I that that 22 degree angle was the same on the side of both the Day-Brite patented structure and the Ruby accused structure? [114]

The Witness: Yes, your Honor.

The Court: On the right-hand side of the chart the straight lines and the dotted lines would appear to have somewhat different angles.

Q. (By Mr. Foster): Would you explain that, please, Mr. Kaepfel?

A. Yes. I would say that is due to the fact that on the Day-Brite fixture ours is a stamping, it is made to much closer tolerances than a casting, which is made by less experienced and less skilled men, and therefore the angles of the two sides could be slightly different.

Q. Is there anything done to the castings of the Ruby accused design end plate after they are taken out of the casting or mold? A. Yes.

Q. That would affect this angle?

A. Yes, all castings are either ground or polished

(Testimony of Bertram A. Kaepfel.)

as a final finishing process, and depending upon the coarseness of the casting they would need either more or less grinding.

Q. Would the variations of the $22\frac{1}{2}$ degree angle sides of the Ruby accused design castings from the full line shown in this exhibit Plaintiff's 11-I, be variations within working tolerances allowing for the polishing and the casting operation?

A. Yes, sir. [115]

Q. I notice that a vertical wall is chosen at each side of the central upwardly projecting top portion of these end plates on Plaintiff's Exhibit 11-I. Why were those walls vertical instead of an angle from the vertical? Any utility reason for your selecting that vertical wall?

A. Could I have that question again, please? I don't quite understand you.

Q. Yes. I note in this Plaintiff's Exhibit 11-I in the central upper part of the end plates of the Ruby accused design and the Day-Brite patented design there is a vertical wall at the top of that upper projecting portion instead of a wall which might be at an angle with the vertical. Did you select that vertical wall instead of an angle wall for utility reasons? Is my question clear to you?

A. Actually we have a large radius, and then we go into the vertical wall.

Q. My question is could these vertical walls at the top of the end plates have been made at an angle with the vertical?

(Testimony of Bertram A. Kaepfel.)

A. Yes, they could have been anything, surely

Q. And were those vertical walls chosen, then, for appearance reasons? A. Yes.

Q. In the Day-Brite commercial fixture do you find on the sides of the fixture two rectangular panels about midway [116] of the sides?

A. Yes, sir.

Q. And do you find any panels of like nature upon the Ruby accused fixture?

A. Yes, sir, there are similar panels.

Q. As I understand your testimony, then, all of the things indicated upon your drawing Plaintiff's Exhibit 11-I as identical in end plates, number of transverse louvers, and overall length were selected by you in the Day-Brite fixture for their appearance value and not for utility reasons, is that true? A. That is true.

Q. And all of those things thus indicated, the dimensions, angles, number of louvers, and length, could have been varied to any one of a great number of alternative values without detracting from the utility of the fixture, is that true?

A. Yes, sir, it is true.

Q. And each individually and all of them in the aggregate were selected by you entirely for their appealing appearance? A. Yes, sir.

Q. And that would include the width and height of the end plate, as well as all of the angles shown on this Plaintiff's Exhibit 11-I, is that correct?

A. Yes, true. [117]

(Testimony of Bertram A. Kaepfel.)

Mr. Foster: That is all of the direct examination of this witness. [118]

* * *

Cross-Examination

By Mr. Miketta:

The Court: Proceed.

Q. Mr. Kaepfel, do you know of the Electric Testing Laboratories?

A. Yes, sir, I have heard of them.

Q. Do you know what they do?

A. To the best of my knowledge, they test electrical equipment.

Q. Have you ever seen any reports published by the E.T.L.?

A. Yes, sir; I have seen them.

Q. And those reports on fixtures manufactured by the plaintiff concern are obtained by the plaintiff, are they not?

A. May I have that question again?

Q. Does the plaintiff obtain reports on its fixtures from E.T.L.?

A. Yes, sir.

Q. And those charts or graphs are published by the plaintiff? [125]

A. Yes, sir.

Q. Now, those graphs and charts show the distribution of light from a fixture; is that right?

* * *

The Witness: It is correct.

Q. (By Mr. Miketta): In which directions or along what axis is that distribution shown?

(Testimony of Bertram A. Kaepfel.)

A. I don't know that I am very well qualified to speak on that.

Q. You don't know anything about the distribution of light from an electric fixture?

A. I know merely that the fixtures are tested in three different planes, and that is as far as my knowledge goes.

Q. And which are the planes?

A. The planes would be vertical longitudinal, vertical lateral, and a vertical plane bisecting those two.

Q. In other words, a plane taken lengthwise, a vertical plane taken lengthwise of the fixture? [126]

A. Yes, sir.

Q. Another plane, vertical plane, transverse to the fixture? A. Yes, sir.

Q. And then another plane at an angle to those?

A. Bisecting the two, at a 45-degree angle.

Q. At a 45-degree angle? A. Yes, sir.

Q. Very well. Do you know whether the distribution of light is measured both above the axis of the lighting fixture, longitudinal axis of the lighting fixture, as well as below that axis or plane?

A. Yes, it is.

Q. It is. Now, you have been with Day-Brite since 1935; is that correct?

A. It is correct.

Q. What are your duties and activities?

A. My duties concern themselves primarily with the procurement of proper tooling and machinery for production of lighting fixtures. I also do a

(Testimony of Bertram A. Kaepfel.)

good deal of design work, that is, assist in the designing of lighting fixtures.

Q. Now, those are your present duties; is that correct? A. Yes, sir.

Q. What were they in 1935? [127]

A. In 1935, when I joined the company, I was hired for the purpose of making drawings of lighting fixtures.

Q. What did you do, or, how did your work enlarge after that?

A. I beg pardon? I didn't hear that.

Q. Did you change your activities as you stayed with the company?

A. Yes, those activities changed right along. I gradually became responsible for more and more work.

Q. Now, being in charge of production, you may say, of tools and dies, when did you first start doing work which pertained to the manufacture or the arrangement of dies used in fabricating fixtures?

A. It is difficult to pin that down to an exact date——

Q. To your best recollection.

A. ——because I started in by helping someone else do that work. To the best of my recollection, it would be about 1939 or '40; around in there.

Q. Are you an engineer?

A. I am a member of the American Society of Tool Engineers. I am not a registered engineer.

Q. Now, in the design of fixtures, you take into

(Testimony of Bertram A. Kaepfel.)

consideration the production difficulties that might arise in making such a fixture, do you not?

A. Very definitely, yes, sir. [128]

Q. So that you are familiar with fabrication of parts and their assembly? A. Yes, sir.

Q. Are you familiar with progressive dies?

A. Yes, sir.

Q. And lancing dies? A. Yes, sir.

The Court: Lancing?

Mr. Miketta: Lancing, yes, your Honor.

Q. (By Mr. Miketta): That is a perforating die, is it not, Mr. Kaepfel?

A. Yes, sir. It partially perforates and partially forms.

Q. In your engineering experience and production in dies and tooling, you have taken into consideration the strength of the materials employed; is that correct? A. Yes, sir.

Q. And the necessity of reinforcing it, if the occasion so warrants; is that right?

A. That is correct.

Q. Have you ever done any sales work?

A. No, sir.

Q. Now, you are familiar with the various fixtures made by Day-Brite, are you not?

A. Very familiar. [129]

Q. How many different fixtures do they make?

A. I don't think that I could state that without guessing.

Q. Well, what is your best guess? I am not talking about the number that they manufacture

(Testimony of Bertram A. Kaepfel.)

per year, Mr. Kaepfel. I am not interested in that, but just in the different types that they make. Of course, they make a two-tube unit, do they not?

A. We make a one-tube, two-tube, three-tube, four-tube; anything the customer will require.

Q. That is right. Now, let's just talk about the two-tube and the four-tube fixtures. Approximately how many different types of fixtures does Day-Brite make in just these two categories?

* * *

The Court: What is the least number you certainly make in, we will take the two-tube class? They make more, but you are certain they make how many styles in the two-tube [130] class?

The Witness: It can be resolved by saying we make no less than ten.

Q. (By Mr. Miketta): Not less than ten different styles; is that right?

The Court: In the two-tube class.

The Witness: Yes. [131]

* * *

The Court: What is the least number that you are certain of in the four-tube class?

The Witness: I would have to have some time to stop and think, see exactly what it is that we make.

The Court: They make one, don't they, in the four-tube class, one standard type, to start with?

The Witness: Let us say that it is six as a

(Testimony of Bertram A. Kaepfel.)

minimum of two-lamp fixtures that we make of the standard type.

The Court: Two-tube?

The Witness: Of the two-tube, yes.

Q. (By Mr. Miketta): How about the four-tube?

A. Four could be used as a minimum number of four-lamp [132] standard fixtures.

* * *

Q. Very well. Do those fixtures vary in length?

A. If I understand the question correctly, they do not vary in length individually. The different classifications of fixtures may vary somewhat.

Q. In other words, if you are making fixtures to accommodate the so-called 48-inch fluorescent tube, then all of the fixtures that are supposed to receive 48-inch tubes are of substantially the same length, is that correct?

A. They would be subject to differences as great as $\frac{7}{8}$ of an inch.

Q. Very well. So you would call $\frac{7}{8}$ of an inch, you might say, your manufacturing tolerance, is that correct?

A. No; that is a design tolerance.

Q. Do you also make fixtures to accommodate shorter tubes?

A. Yes, sir, we make fixtures for the 18-, 24-, 36-inch tubes, also.

Q. So that 36-inch tubes will take a fixture that is built to accommodate 36-inch tubes, and if you want a fixture to take 48-inch tubes, you build a

(Testimony of Bertram A. Kaeppel.)

fixture to accommodate that, is that correct?

A. If by "accommodate" you mean that the fixtures [133] themselves are the exact length of the tubes, that is not the answer.

Q. That was not the premise.

The Court: Read the question.

Q. (By Mr. Miketta): I understand that there are end pieces which are outside the end of the 48-inch tubes, so that your overall fixture is probably a little longer than 48-inches.

A. That's right.

Q. But in a fixture which accommodates a 36-inch tube, the end plates are just slightly more than 36 inches apart, is that correct?

* * *

The Witness: The answer to that would be that we do have some fixtures which would run a matter of several inches over the lamp length.

Q. (By Mr. Miketta): But a fixture that is built to accommodate a 36-inch tube would not actually receive and operatively hold a 48-inch tube, is that correct? [134]

A. That is correct, yes, sir.

Q. I would like to have you refer to Plaintiff's Exhibit 1. I understand that you made these sketches personally, is that right?

A. That is correct.

Q. Is that correct? A. Yes, sir.

Q. At the time that you were working on these sketches, were there any other draftsmen being employed by Day-Brite?

(Testimony of Bertram A. Kaepfel.)

A. Yes, there were certainly three or four other draftsmen.

Q. Were you in charge of that department, Mr. Kaepfel? A. No, sir, not at that time.

Q. Who was in charge of that department?

A. Do you want the man's name?

Q. I asked the question.

A. Mr. John Gornet, G-o-r-n-e-t.

Q. Were these made under his supervision?

A. Yes, they were.

Q. Who directed you to start this work which you did in designing a fixture?

A. I started it under my own authority.

Q. In other words, this was an independent enterprise, [135] you weren't told to do this by anyone? A. Yes, sir.

Q. Who authorized the making of the various mockups to which you referred?

A. I authorized those, also.

A. I didn't hear you.

A. I authorized those, also.

Q. No one else had anything to do with them?

A. Not directly.

Q. This man who was in charge of the engineering department, didn't he have anything to say about that?

A. He has many other duties, and it isn't always incumbent upon him to be immediately responsible for work of this type.

Q. But the cost of making the mock-ups was such an insignificant sum that you authorized it,

(Testimony of Bertram A. Kaepfel.)

you just went ahead and had them made, is that correct?

A. If \$100 is an insignificant sum, that is correct.

Q. But you didn't need any special authorization or appropriation, as a matter of fact no actual order was given by anyone in authority to have this designing work done or to have the mock-ups made, isn't that correct?

A. It is correct that I had sufficient authority to initiate that order. [136]

Q. Why did you start designing a two-tube fixture and not a four-tube fixture?

A. Because it seemed to me that the demand for the two-tube fixture would be much greater than the demand for the four-tube fixture.

Q. You had no sales experience you told me; how did you know that?

A. I have had much opportunity to talk with salesmen and representatives of the company when they come to the home plant for a visit.

Q. But personally you did not do any sales work, am I correct? A. That is correct.

Q. What length fixture did you start designing when you started to do the work which is shown in Exhibit 1?

A. We started designing a fixture for a 48-inch tubular lamp.

Q. So that the length of the fixture was established as soon, that is, within narrow limits, as soon as you decided to use a 48-inch tube, is that correct?

(Testimony of Bertram A. Kaeppel.)

A. The minimum length was established at that time.

Q. Exhibit 1-A is a sketch of a housing for the ballast and the reactors, and apparently to hold the sockets for the end of the tube, isn't that correct?

A. That is correct. [137]

Q. That sketch indicates a two-piece housing, does it not? A. It does, yes, sir.

Q. That is, it has an upper part and a lower part? A. Correct.

Q. Do you still use a two-piece housing in the fixture which is before the court here?

A. Yes, sir, we still do.

* * *

Q. The two-piece housing, how is that held together?

A. The wiring cover is snapped onto the back channel.

Q. Is it not a fact, Mr. Kaeppel, that the [138] two-piece housing is shown and described in Plaintiff's Exhibit 5, which is Patent No. 2,411,952? You are familiar with that patent, aren't you? That is the one that was issued in 1946 on an application filed in 1944.

* * *

The Witness: The answer is that this patent No. 2,411,952 does show the snapped-on cover.

Q. (By Mr. Miketta): Are you familiar with the marking that appears on the fixtures which embody the patented design? [139]

(Testimony of Bertram A. Kaepfel.)

* * *

Q. This patent number to which you refer, 2,411,952, does it appear on that fixture, Plaintiff's Exhibit 13?

A. Do you mean the patent number itself, is it engraved on the fixture?

The Court: Printed, engraved, stamped——

The Witness: No, sir, it is not.

Q. (By Mr. Miketta): Are there any patent numbers that are marked or engraved on that fixture?

A. There are none that I know of.

Q. Now, the can or housing which you show here on Exhibit 1-A could also be used in any other two-tube fixture, is that correct?

A. "Any other" would be a rather broad statement. It would depend upon the enclosure to be used with this chassis or can, as you refer to it.

Q. Well, without quibbling, could you admit that it could be used on other fixtures?

A. It can be used on other fixtures, yes.

Q. And are you actually using the split-housed can or housing on fixtures other than the fixture identified here as Exhibit 13?

A. Yes, sir, we are.

Q. Why did you perforate the end plate on the fixture which is shown in the two patents in suit here, Plaintiff's Exhibits 3 and 4, and which is supposed to be embodied in [140] Plaintiff's Exhibit 13?

A. If I understand the question, you are refer-

(Testimony of Bertram A. Kaepfel.)

ring to the ornamentation in the end of the viz-aid fixture. The perforations were put there for purely ornamental or decorative purposes.

Q. By such perforations and ornamentation you are referring to the light-colored portions which are visible in the end plate of Exhibit 13?

A. Yes, sir, I am.

Q. How would you describe those perforations, that is, their form? Zigzag form?

A. Yes, zigzag or modified S-shape.

* * *

Q. Is it not true, Mr. Kaepfel, that those are perforations in the end plate, and you have a louver in back of it that is a separate member?

A. Yes, sir, there is a backing-up plate.

Q. So that the end plate itself is perforated?

A. Yes, sir.

Q. In the course of your 15 years of work with the Day-Brite Company, the plaintiff here, and prior to the work that you started and which is referred to in Exhibit 1, were [141] you familiar with other fluorescent fixtures that were being manufactured by other manufacturers?

A. I was familiar with them to the extent that I would see illustrations in catalogs which, naturally, we were interested in.

Q. Well, you made a collection of all the catalogs relating to fluorescent fixtures that you could find, did you not?

A. Yes, sir.

Q. That is customary in all manufacturing plants?

A. That is customary.

(Testimony of Bertram A. Kaepfel.)

Q. You were familiar with the Wakefield line, the Miller line, were you not?

A. The word "familiar" is a rather broad one. I knew of them and knew of some of the individual fixtures.

Q. And you had seen illustrations of those fixtures? A. Yes, sir.

Q. And is it not a fact that in most of the catalogs published by manufacturers of lighting fixtures they give you a little diagram giving the height and the width of the end plate, you may say, or cross-section, so that an architect knows how it will fit in or how far it will extend from the ceiling?

A. Yes, sir, that is so.

Q. So that prior to 1943 you had seen fixtures manufactured [142] by others which had longitudinally extending, outwardly inclined side panels, had you not? A. There may have been. [143]

* * *

Q. (By Mr. Miketta): I show you Plaintiff's Exhibit 9 which is in evidence, and particularly, a sheet bearing the letter "H," which shows a Challenger fixture. Does that fixture have downwardly or upwardly and outwardly inclined side panels?

A. Yes, sir, it does. [144]

* * *

Q. (By Mr. Miketta): Were those panels translucent?

* * *

(Testimony of Bertram A. Kaepfel.)

The Witness: They were.

Q. (By Mr. Miketta): Do you know why in a fluorescent lighting fixture those side panels are made translucent?

A. They would be made translucent for the improved appearance of the fixture.

Q. Is that the only reason?

A. There would also be more emitted light.

Q. And the light is emitted to the side, is it not?

A. Yes, sir, it is.

Q. And downwardly?

A. Outwardly or downwardly, yes, sir.

Q. Now, the bottom of this fixture which is shown in Exhibit 9-H was open. It did not have any solid sheet; is that correct? A. Yes, sir.

Q. And it had both longitudinal and transverse louvers in the bottom of that fixture, did it not?

A. As shown on the drawing, it does have those.

Q. Do you know what the purpose is of both longitudinal and transverse louvers in the bottom of a fluorescent fixture? [145]

A. Yes, sir, I do.

Q. What is the purpose?

A. To shield the lamp from the eye of the viewer.

Q. In other words, you want to prevent an observer from looking directly in the tube; is that correct? A. That is one purpose, yes, sir.

Q. What is the other purpose?

A. The other purpose would be for the appearance of the enclosure and the whole.

(Testimony of Bertram A. Kaepfel.)

Q. Is it true from an examination of this exhibit and whatever you know about this fixture that the bottom of that fixture is not flat, but is inclined?

A. The picture shows that the sides are inclined, —the bottom is inclined, yes, sir.

Q. Towards the center line? A. Yes, sir.

Q. And the spacing between the transverse louvers in a fixture depends upon the distance of that louver from the fluorescent tube, so as to get the proper cut-off angle at which an observer would not see the tube; is that correct?

* * *

Q. (By Mr. Miketta): And perhaps you may want to add [146] another factor; that the height of the louver also influences the spacing that you would have between the louvers, to give you a cut-off angle?

A. That is right. That is correct.

Q. Now, by referring to the preceding exhibit in Plaintiff's Exhibit 9, the one preceding H, —

The Court: G?

Mr. Miketta: Yes, your Honor.

Q. (By Mr. Miketta): —and particularly to page 14, I call your attention to the lighting fixture which is shown in the lower right-hand corner of page 14.

* * *

Q. (By Mr. Miketta): That also has translucent sides; is that correct? A. Yes, sir. [147]

(Testimony of Bertram A. Kaeppel.)

Q. And they are inclined upwardly and outwardly; is that correct? A. Yes.

Q. And it has a louvered bottom provided with both transverse and longitudinal louvers; is that correct? A. Yes, sir.

Q. And the end of that fixture is provided with a central boss or upright portion which is higher than the edge portions of that end, the upper edge portions of that end; is that correct?

Mr. Foster: I object to that question and to this line of questioning on the ground that these documents speak for themselves. He is asking him whether a device shows so-and-so, or it does so-and-so. The best evidence is the illustration itself.

Mr. Miketta: I am laying a foundation.

The Court: The witness has testified that these were some of the designs that he saw before he worked on his.

Mr. Foster: That hasn't been testified to, your Honor.

The Witness: No, sir.

The Court: What is that?

The Witness: No, your Honor. [148]

* * *

The Witness: The drawing shows such upward projection.

Q. (By Mr. Miketta): Now, fixtures of this type can be suspended from a ceiling in several ways, can they not?

A. That is a rather broad statement.

(Testimony of Bertram A. Kaepfel.)

* * *

Q. Can your own fixture be suspended from the ceiling, either in close contact with the ceiling or from standards or pedestals?

A. Yes, sir, it can.

Q. Have you seen other fluorescent fixtures also suspended from ceilings in those two ways?

A. Subsequent to our fixture, yes, sir.

Q. But you had never seen it previously to that time, any other fluorescent fixture hung in any other way, or in that way?

A. I may have without being able to state positively "Yes" or "No" at this time.

Q. You did see pictures of various fixtures, did you [149] not?

The Court: You mean before he made his?

Q. (By Mr. Miketta): Before you started designing your own?

A. Undoubtedly I have, yes, sir. [150]

* * *

Q. (By Mr. Miketta): Have you seen fixtures hung in the manner of Exhibit 14 in the court room here previously to today or yesterday?

A. Yes, sir, previously to today or yesterday.

* * *

Q. (By Mr. Miketta): Now, when a fixture's hung in the manner before you here, is there any light which is thrown up against the ceiling?

A. Yes, sir. A certain proportion of the light would be thrown upward against the ceiling.

(Testimony of Bertram A. Kaepfel.)

Q. If you didn't have that step-down or the fact that you have a central upstanding portion in the upper edge of the end, you would not have any light thrown up against the ceiling; is that correct?

A. That is correct.

Q. I understand that the Day-Brite fixture, Exhibit 13, can be easily relamped; is that true?

A. That is true.

Q. Could you demonstrate that, please?

The Court: You may step down. [152]

* * *

Q. (By Mr. Miketta): Will you demonstrate the manner in which it can be readily relamped?

(The witness does as requested.)

Q. (By Mr. Miketta): Now, if it was hung from the ceiling, how would you do that?

The Court: Let the record show the witness has taken out one of the fluorescent tubes.

The Witness: It can be done in the very same manner. There is sufficient room between the upper edge of the side member and the ceiling to permit this type of relamping at any time.

Q. (By Mr. Miketta): Is it not a fact that the entire bottom portion of this frame comes off?

A. Yes, it is a fact.

Q. And isn't that the way it is relamped—

A. Not necessarily.

Q. —when the thing is hung on the ceiling?

A. Not necessarily.

(Testimony of Bertram A. Kaepfel.)

Q. Will you demonstrate how it comes apart?

(The witness does as requested.)

The Witness: I am at a physical disadvantage here because of a manual disability, and, of course, the means of [153] mounting here. With the fixture properly in place, it is a matter of seconds.

Mr. Miketta: Let the record show that the witness has lowered the frame of the fixture——

The Court: Exhibit 13.

Mr. Miketta: ——Exhibit 13 from the upper portion, which constitutes the chassis and the fluorescent tubes and includes an end cover.

The Court: That now the bottom portion hangs by a chain from what you have called the can.

Mr. Miketta: The can or chassis. [154]

* * *

Q. (By Mr. Miketta): Mr. Kaepfel, you are familiar with the literature published by the plaintiff in this case, are you not?

A. Yes, sir, I am.

Q. I show you Bulletin 10——

The Court: Has it been marked for identification?

Mr. Miketta: May I have it marked for identification, please?

The Clerk: Defendant's Exhibit A for identification.

* * *

Q. I show you Defendant's Exhibit A for iden-

(Testimony of Bertram A. Kaepfel.)

tification, a Bulletin No. 10-B-1, allegedly published August, 1946; you have seen this previously?

A. Yes, sir, I have.

Q. Do you identify it as a publication of the plaintiff? A. Yes, sir, I do.

The Court: What date?

Mr. Miketta: August, 1946, your Honor.

Q. I call your attention to page 8 of that bulletin, and particularly the illustration appearing in the upper section. [155] Does that pictorially describe and show the manner in which the frame of the fixture can be removed from the chassis or suspended from the chassis in the manner which you have just demonstrated to the court?

A. Yes, sir, it does.

Q. I call your attention to page 6 of that bulletin, particularly the lower portion headed "All fixtures use this same basic chassis"; does that show the chassis which is employed in the Exhibit 13 which you have demounted?

A. Yes, sir, it does.

Q. And it is my understanding that the construction of the chassis illustrated on page 6 is that which is described in Plaintiff's Patent Exhibit 5, is that correct? A. Yes, sir, it is.

Mr. Miketta: I ask that the exhibit identified by the witness be introduced in evidence as Defendant's Exhibit A, your Honor.

Mr. Foster: It is a duplication, Mr. Miketta, of Plaintiff's Exhibit 6-K, the same catalog.

(Testimony of Bertram A. Kaepfel.)

Mr. Miketta: Well, I would like to have this separately, please.

The Court: It may be received as Defendant's A in evidence. [156]

* * *

Q. (By Mr. Miketta): Now, Mr. Kaepfel, again referring to Exhibit 1, which of those drawings is a drawing of the design in the patent in suit?

A. It would be represented by the letter E and the letter D.

Q. Both of them represent the design of the patent in suit? A. Yes, sir.

Q. Well, I would like to call your attention to Plaintiff's Exhibit 3 and ask you to point out wherein in Exhibit D or section D of Plaintiff's Exhibit 1 do you find the round bead at the bottom end of the V-shaped louver which is illustrated in figures 1 and 2 of patent 138,990.

A. You do not find that on these drawings, because——

Q. By "these drawings" you refer to Exhibit 1-D? A. Yes, sir, or 1-E.

Q. Therefore the drawings 1-D and 1-E do not show the rounded bead which is a characteristic of the design in design patent 138,990, Plaintiff's Exhibit 3, is that correct? [157]

* * *

The Witness: The answer to that would be that the bead as shown in the patent drawing was at

(Testimony of Bertram A. Kaepfel.)

one time and for about a period of one year on these drawings.

Q. (By Mr. Miketta): Well, then, have these drawings, Exhibit 1-D and -E been altered.

A. They have been altered as indicated by change letters A and B on Exhibit 1-D, and as indicated by revision B on Exhibit 1-E.

Q. There are two letters, both A and B adjacent the central figure of Exhibit 1-D. What do they mean?

A. Those small figures indicate that a revision took place and are identified by the revision letter as such.

Q. Were those revisions made prior or after the date appearing on Exhibit 1-D?

A. They would be made after that date.

Q. I thought you testified, Mr. Kaepfel, that these drawings were made on the date shown on these drawings.

A. The original drawing was made on the date shown on Exhibits D and E, respectively, but they are subject to change as we improve the fixture.

* * *

Q. (By Mr. Miketta): Let me get this straight. On 6-22-44, which appears on Exhibit 1-D as it was originally made on 6-22-44, was the drawing in the same condition that we now see it, or was there a rounded bead at the end of that V-shaped louver?

A. On 6-22-44 there was a circular bead extending the full length of the central V-shaped louver.

(Testimony of Bertram A. Kaepfel.)

Q. And at some subsequent date that was erased and that bead was taken out, is that correct?

A. That is correct.

Q. On what date was that taken out?

A. It is not discernible on these photostatic copies. It may be discernible on the court's copy.

(Exhibit handed to the witness.)

The Witness: Revision B on the drawing dated 6-22-44 indicates a change 9-16-46.

Q. (By Mr. Miketta): And that is the change from the rounded bead to a straight-sided V, is that correct?

A. It is either that one or revision A dated 6-28-45. The exact sequence of those changes escapes me at the moment.

Q. Now, I call your attention to the sketch appearing on the right-hand side of Exhibit 1-D and ask if that does not show that the side rail at the top of the frame and at the bottom of the frame was joined together by three spaced [159] bars, each of them having an embossed bead.

A. Yes, it shows that on the drawing.

Q. There was no change made in that, was there, since 6-22-44?

A. Since that date there has been no change.

Q. So that that is a part of the design, is that correct?

A. Yes, sir, that is correct.

Q. I call your attention to figure 1 of design patent 138,990, that is Plaintiff's Exhibit 3, and ask if you can find there three parallel bars each with an emboss thereon.

(Testimony of Bertram A. Kaepfel.)

A. The design patent drawing does not show the emboss. It shows the three parallel bars.

Q. But it does not show the emboss?

A. No, it does not.

Q. I call your attention to Plaintiff's Exhibit 13, which is the plaintiff's fixture, and ask if that fixture at its side has upper and lower rails connected with three parallel bars each with an embossing on it?

A. Yes, sir, the exhibit shows that. [160]

* * *

Mr. Miketta: Very well. I will change my question if Mr. Foster so desires and ask a leading question.

Q. Does the cover plate illustrated in figure 1 of Exhibit 3 include a round protuberance?

A. Yes, sir, it does include a protuberance.

Q. And that is within a recessed area of that cover plate, is that correct?

A. Yes, sir, it is.

Q. I call your attention to Plaintiff's Exhibit 13 and the cover plate on the end of the chassis and ask if you find in Plaintiff's Exhibit 13 a round protruding boss within the recessed area of that end plate.

A. No, sir, there is not.

Q. Now, I ask you to look at Plaintiff's Exhibit 15, which is the defendant's four-tube fixture, and ask if you find in that fixture a separate cover plate for the chassis.

A. No, sir, there is not.

Q. Do you find the circular boss which appears

(Testimony of Bertram A. Kaepfel.)

in figure 1 of Exhibit 3 in the end plate or the end of Plaintiff's Exhibit 15?

A. No, sir, there is not.

Q. Have you examined Exhibit 15 previously?

A. No, sir, I have not.

Q. Have you had a chance to work with it or take it apart? A. No, sir, I have not.

Q. You did make a sketch of the end, did you not? A. Not of that exhibit at all.

Q. Was it of the two-tube fixture?

A. It was of the two-tube fixture. [162]

* * *

Q. Can you see that end on Exhibit 14?

A. Yes, sir.

The Court: Referring now to the end to which the electric wire is attached.

Mr. Miketta: Very well.

Q. Does that have a separate end cap for the chassis as is true in Plaintiff's Exhibit 13?

A. No, sir, it does not have.

Q. Does it have the circular boss within a recess to which you have previously referred?

A. The end that I can see here has no separate boss. [163]

Q. Very well. Now, let's turn it around. Now, I call your attention to the other or opposite end of the fixture, Exhibit 14, the one through which the light cord is not attached, and ask if that has a separate cover-plate for the chassis.

A. No, sir, it does not have.

Q. Does it have a protruding boss within a recess?

(Testimony of Bertram A. Kaepfel.)

A. There is a protruding boss, but not within a recess.

Q. To what extent does that protrude, Mr. Kaepfel?

A. That would be difficult to say from here.

Q. Well, during the noon recess——

The Court: Let's get a stipulation on that right now?

Mr. Foster: How long do you say it protrudes?

Mr. Miketta: I would say about 1/16 of an inch.

Mr. Foster: I will so stipulate. I think that is right.

The Court: To the court, who is sitting approximately 15 feet or 16 feet from it, that particular boss appears to be about the size—a little bigger than a nickel and smaller than a quarter in diameter.

Mr. Miketta: That is correct.

Q. (By Mr. Miketta): Mr. Kaepfel, is it not a fact that that little circular protrusion to which you have referred is termed a knock-out?

A. That boss is a knock-out plug. [164]

Q. That is for the purpose of making connections from one fixture to the other when those fixtures are in abutting aligned relation; is that correct?

A. That is correct.

Q. On the fixture, Plaintiff's Exhibit 15, that knock-out has been knocked out of both ends of the fixture; is that correct?

A. Yes, sir; there is no plug in those holes.

(Testimony of Bertram A. Kaepfel.)

Q. (By Mr. Miketta): Now, then, Mr. Kaepfel, you stated [165] that the bead in the bottom of the V-shaped louver was used to attach the louver to the end; is that correct?

A. The bead was originally used for that purpose, yes, sir.

The Court: To make a hole, and that is where the screw went in?

The Witness: Yes. The bead was used as a hole for a thread-cutting screw.

Q. (By Mr. Miketta): Therefore, you did not have to use a bracket or drill a separate hole in order to make the connection; is that correct?

A. That is correct.

Q. While we still have the exhibits here, though, I want to call your attention to one other fact. Is it true, Mr. Kaepfel, that the V-shaped longitudinal louver of the plaintiff's device, Exhibit 13, is made of a specular or mirror-like material?

A. That is correct; it is.

Q. In other words, it gives a mirror-like reflecting surface on the outside? A. It does.

Q. Now, the defendant's devices, such as Exhibits 15 and 14, do not use a mirror-like surface on the longitudinal louver, do they?

A. They do not. [166]

Q. Thank you. I call your attention to the end of Plaintiff's Exhibit 15. Is it true that those ends are provided with two cut-out portions in the form of a leaf or a fern or some curvaceous element?

A. Yes, sir. Both exhibits show such a cut-out.

(Testimony of Bertram A. Kaepfel.)

The Court: By that you mean Exhibits 14 and 15?

The Witness: Yes, sir, both Exhibits 14 and 15.

Q. (By Mr. Miketta): And that is of different configuration than the zig-zag cut-outs on Exhibit 13; is that correct?

* * *

The Witness: The answer is: Yes, it is.

Q. (By Mr. Miketta): Is it true, Mr. Kaepfel, that the end of Exhibit 15 is flat, it lies in a single plane, with the exception of certain recesses. There are two larger spaced recesses in the upper portion, separated by two smaller recesses, and then a lower recessed surface connected at its upper edge and extending from side to side at the end; is that correct?

A. That is a long sentence, but, to the best of my knowledge of the question, that is correct.

Q. Well, you were watching me while I was asking the question? [167]

A. Yes, sir, I was watching you.

Q. And you followed me, did you not?

A. Yes, sir.

Q. Of course, up above we have this knock-out, which in this instance has been knocked out and constitutes a hole?

A. Correct.

Q. And that end piece that you are looking at on Exhibit 15 is a casting, is it not?

A. It is a casting.

Q. Now, the end pieces of Plaintiff's device, Exhibit 13, are not a casting, they are pressings; is

(Testimony of Bertram A. Kaepfel.)

that correct? A. They are stampings.

Q. Stampings—is that right? A. Yes, sir.

Q. And the defendant's end piece has a two-tone effect in that the recesses which we have just described and identified have a pebbled surface, whereas the rest of that plane is relatively smooth; is that correct?

A. That is correct, yes, sir.

Q. Now, the end of Plaintiff's Exhibit 13, if we place the cover plate of the chassis into the recess of the end piece, and now consider both of them in the position which they would normally assume when hung, that end piece does not lie in a single plane, does it?

A. If you consider the entire end appearance as a single [168] element, it does not.

Q. Because the cover plate of the chassis protrudes beyond the plane of the lower portion; is that correct? A. It is correct.

Q. Then, in addition to that, you do have a lower recess, which is trapezoidal in form somewhat, and that recess has the cut-out zig-zag pattern in it; is that correct? A. Yes, sir.

Q. And that end of Exhibit 13 is one uniform texture of finish; is that correct?

A. That is correct, also.

* * *

Q. (By Mr. Miketta): Mr. Kaepfel, will you please turn to Exhibit 2, and I will try to make this very brief. I understand that the tabulation of costs allegedly was made under your direction and some

(Testimony of Bertram A. Kaepfel.)

of it was made by you personally; [169] is that correct?

* * *

The Witness: That is correct.

Q. (By Mr. Miketta): Did you personally check all of the invoices? A. Yes, sir.

Q. And you knew the dates of all the invoices?

A. Yes, sir.

Q. And the sums involved? A. Yes, sir.

Q. Now, on page 107, you were asked this question:

“And is the total sum shown by the summary on sheet A of Plaintiff’s Exhibit 2 for identification, being \$59,445.67, the amount actually paid by the plaintiff after the perfection of the design of the patents in suit . . . ?”

Were all those sums paid after you had perfected the design of the patents in suit?

A. Yes, sir. [170]

* * *

Q. (By Mr. Miketta): I call your attention, Mr. Kaepfel, to Exhibit 2, sheet B, and I notice that the first four items there do not have a date other than 1944. That is correct, is it not?

A. It is difficult to see the marking. I believe I have it here now. The dates that you refer to in this place, in this instance, are the dates on which the orders were let for this die work, yes, sir.

Q. And the dates there appearing are simply the year 1944; is that correct? A. Yes, sir.

Q. You testified that you checked certain in-

(Testimony of Bertram A. Kaeppel.)

voices and knew the dates of the invoices. Why didn't you put those dates in?

A. Because at the time that I conceived the idea of keeping a running record of all these invoices, those had passed me by and were already in the company's file, but I had approved all of these invoices.

Q. Now, when did you start keeping this record?

A. I started keeping it, as near as I can remember, in December '45.

Q. December of '45?

A. No, no. That's wrong. But it must have been immediately subsequent to this, because all the other dates [172] are complete.

Q. They are? A. Yes, sir.

Q. I call your attention to sheet C in Exhibit 2,—— A. Oh.

Q. ——and particularly items 5 to 9, which simply bear the date 1945. What were the dates of those invoices?

A. The reason for the incompleteness of those dates is that in many instances I am asked to approve an invoice before I am given the original copy of the purchase order, which has the date on it, on which the original order is issued.

Q. Well, in other words, you didn't see the dates on those invoices, did you?

A. I see the date on the invoice, but not the date of the original purchase order. [173]

Q. Why didn't you put in the date of the invoice? I thought that is where you got your record.

(Testimony of Bertram A. Kaepfel.)

A. No, sir; I always put in the date that the original purchase order is issued.

* * *

Q. (By Mr. Miketta): When did you get this compilation up?

A. The copies as you see them here were prepared for the purpose of this trial and would have been prepared within the last nine months.

Q. At that time when you were preparing this particular series of sheets, which are Exhibits 2-B to 2-F, did you check specified invoices against the figures which you now show here on Exhibits 2-B to 2-F?

A. No, sir, I did not check that personally. [174]

* * *

Q. (By Mr. Miketta): Mr. Kaepfel, will you turn to Exhibit 2-M, the letter "M" as in Mary?

A. Yes, sir, I have it.

Q. That shows the one-piece side rail assembly, is that correct? A. Yes, sir, it does.

Q. Whereby you can punch one sheet of metal and have the top rail, the bottom rail, the ends, the three interconnecting members with their bosses?

A. Yes, sir.

Q. Now, with respect to that item M, which is identified on the drawing as S or PY-18468, I call your attention to Exhibit 2-C of your tabulation; now, the second item is S-18468, is that correct? That relates to Exhibit M.

A. Yes, sir, it does.

Q. And opposite that in the penultimate vertical

(Testimony of Bertram A. Kaepfel.)

column is 1755.57, is that correct? A. Yes, sir.

Q. One thousand seven hundred fifty-five dollars and fifty-seven cents. Now, will you look at the ninth item? A. Yes, sir.

Q. Does that relate to the same device?

A. Yes, sir, it does.

Q. And what figure is charged against that?

A. \$160.60.

Q. Now, look at the eleventh item. Is that the same device? A. Yes, sir, it is.

Q. And how much is charged against that?

A. \$810.

Q. Now, look at the fifteenth item. Is that the same piece? A. Yes, sir, it is.

Q. How much is charged against it? [177]

A. \$1,755.57.

Q. How is it that you have charged upon this thing, under the date of 1944 in the second item on that page, exactly the same figure of \$1,755.57, and then repeated that under the date of 9-25-44 in item 15?

A. That can be due only to a clerical error on the part of the stenographer tabulating this sheet.

Q. Would it surprise you to know, Mr. Kaepfel, that there are a number of similar duplications here? A. It would, yes, sir.

Q. Shall I prove it to you? A. Sir?

Q. Shall I prove it to you?

The Court: Counsel for the plaintiff concedes that it is a complete list of all parts of the device. By that it would include the can, for instance. [178]

Mr. Foster: Yes, sir.

(Testimony of Bertram A. Kaepfel.)

The Court: Which obviously isn't part of the design patent. It apparently includes anything that concerned this device, and it has been broken down.

With that concession, of course, it means that if there was any issues of the amount of money that pertained to this design, somebody would have to go through and segregate it. I am not. As far as I am concerned, you needn't have any concern. I am merely assuming that money was spent and work was done on the device. Now, as to what an appellate court might do about it, I don't know.

I think in view of your cross-examination and in view of your statement in the record that there are matters here that are not attributable to the matter of the design, and in view of the statement of this court, I don't think you need be concerned about your record. This isn't an accounting procedure. I admitted it only because it showed money had been spent, work had been done. I attempted to get you gentlemen to stipulate just in those words, in which event I was going to exclude it, because that is as far as I am going to consider it. [179]

* * *

The Court: I don't think you object to the position I am taking.

Mr. Foster: No, sir, I raise no objection. [180]

* * *

Q. (By Mr. Miketta): Mr. Kaepfel, will you examine the side of plaintiff's Exhibit 15. That side is composed of an upper rail and a lower rail; is that correct?

A. Yes, sir, it is.

(Testimony of Bertram A. Kaepfel.)

Q. Are there three integral parallel bars connecting the top and bottom rail?

A. There is one of them which connects the two rails. The other two are adjacent and appended to the center rail.

Q. You are referring to this medallion?

A. Yes, sir.

Q. That is located midway of the ends of the entire side panel? A. Yes, sir. [181]

Q. Is that medallion integral with the top and bottom rails, or has it been appliqued or welded on?

A. It has been applied.

* * *

Redirect Examination

By Mr. Foster:

Q. Mr. Kaepfel, reference was made to Plaintiff's Exhibit 2 in your cross examination, and the fact there was a duplication of one of the items that went into the final summary that appears in that exhibit. Have you carefully checked, in response to my request, the compilations which appear in Plaintiff's Exhibit 2 during the noon recess?

A. Yes, sir; I have checked those figures.

Q. And is my understanding correct that you have found that there are two duplications and one instance of a transposition of the figures?

A. Yes, sir; that is so.

Q. And that causes the total which appears upon the sheet A of Plaintiff's Exhibit 2 to be changed from \$59,445.67 to \$57,238.12; is that correct?

(Testimony of Bertram A. Kaepfel.)

A. Yes, sir; that is correct.

Q. And it causes the second amount from the top on the same sheet to be changed to \$23,626.75, and the fourth [182] item from the top of that page to be changed to \$9,457.98; is that correct?

A. Yes, sir, it does.

Q. That would involve also those same amounts that are reflected on Page C, and would involve the striking out of the 12th and 15th horizontal row of figures because they are duplications of others?

A. Yes, sir; that is correct.

Q. Are there any other corrections to be made in the compilations which are in Plaintiff's Exhibit 2?

A. No, sir; there were no other corrections.

Q. And where those changes occur or should be made, those are the compilations made by the stenographic help in your office, under your general supervision; is that correct?

A. Yes, sir; that is so.

Mr. Foster: Permission is asked of the court to make the changes I have indicated, which appear in the record and which have been testified to by Mr. Kaepfel, in the original court's copy, and we will gladly identify them to counsel, if they haven't taken notes of the corrections.

The Court: It may be done.

Mr. Foster: Thank you, sir.

The Court: Counsel will make the necessary corrections. I put them in in pencil, but you may correct them. [183]

(Testimony of Bertram A. Kaepfel.)

Mr. Foster: Thank you, sir.

Q. (By Mr. Foster): During your cross-examination, as I recall your testimony, it was that you embarked upon this work of developing the designs of the fixtures of the patents in suit and had authority to have the mock-ups made of the various stages of that design given to the shop. Did Mr. Biller have anything to do with the commencement of the work upon development of the patented design, or authorizing or directing the shop to make the mock-ups?

A. Yes, all that work was done with Mr. Biller's full knowledge, and with his consent. [184]

* * *

Q. On cross-examination you testified that you had the desire to develop a new design of lighting fixture which led to the design of fixtures shown in the patent in suit, and Mr. Biller knew of that desire on your part, did he not?

A. Yes, sir, he knew of it very shortly after the thought occurred.

Q. You say that he knew of it. You know that by virtue of your conversations with him, is that correct?

A. Yes, sir, because I made sketches and at the very first opportunity discussed that matter with him as to the——

Q. How soon after your first discussion of this desire did Mr. Biller participate with you in making

(Testimony of Bertram A. Kaepfel.)

designs for a fixture preliminary to the design of the fixture of the two patents in suit?

* * *

The witness: The answer to that would be that it would be at the very first good opportunity. It might have been one week, it might have been two weeks after I had some preliminary sketches that I would have been able to talk to Mr. Biller about it.

Q. (By Mr. Foster): Thank you, Mr. Kaepfel. In your cross examination now you referred to an angle which I think [186] you called the cut-off angle, as having some effect upon the number of transverse louvers in an overhead lighting fixture for a fluorescent tube. What is that cut-off angle?

A. That cut-off angle would be the angle described between a horizontal plane and an oblique plane running from the bottom of one louver across the top of the other, of the next adjacent louver.

Q. If my understanding is correct, the cut-off angle, then, is the angle between the horizontal plane and the plane of observation of an observer, along which latter plane he could look beneath the edge of one transverse louver and above the edge of the adjacent louver and see the fluorescent tube, is that correct? A. Yes, sir, that is correct.

Q. Does the depth or height of the transverse louver, as well as this cut-off angle, affect the number of transverse louvers that one could have in a given length of light fixture?

A. Yes, sir, every element is effected there.

(Testimony of Bertram A. Kaepfel.)

Q. So if we change either the depth of the transverse louvers or we change the cut-off angle that we desire for a given length of light fixture, we will change the number of transverse baffles, is that correct? A. That is correct.

The Court: When you change the depth of a louver, you [187] automatically change the cut-off angle, don't you?

The Witness: Yes, sir, every element is subject to alteration there.

Q. (By Mr. Foster): But is there anything critical or fixed in that cut-off angle that you must work to? In other words, must you always have that cut-off angle of a given value in different fixtures?

A. Not necessarily at all.

Q. Do you remember what the cut-off angle is approximately in the Viz-Aid fixture, Plaintiff's Exhibit 13?

A. As it now is? I believe it is 28 degrees.

Q. Would the utility of that fixture in your opinion be destroyed if the cut-off angle were made of a different value, a different number of degrees?

A. No, sir, not in the least.

Q. Could a usable fixture be provided if the cut-off angle were 25 degrees instead of 28?

A. It could.

Q. Or 35 degrees instead of 28?

A. It could.

Q. Or any number of degrees differing by one between 25 and 35? A. It could.

Q. Is there anything critical in the height or

(Testimony of Bertram A. Kaepfel.)

depth of the transverse louvers in this Viz-Aid fixture, Plaintiff's [188] Exhibit 13?

A. No, sir, there is not.

Q. Do you recall any vertical dimension of those louvers? A. No, sir, I do not.

Q. Could they be made $\frac{3}{4}$ of an inch greater in depth or height or $\frac{3}{4}$ of an inch less and still be a usable fixture? A. They could, yes.

Q. They could be made to vary as much as an inch in their vertical dimension from their present vertical dimension, or any dimension in between those two limits that I have arbitrarily picked out, varying, say, an eighth of an inch from each other?

A. That they could.

Q. So if we allowed ourselves, as you say we might and still have a usable fixture, we could have eight different variations of height in the transverse louvers differing from each other an eighth of an inch and still have a usable fixture, is that correct?

A. That is true.

Q. And we would still have a usable fixture if we varied the cut-off angle in increments of one degree 10 times, 10 different values between 25 and 35 degrees, and still have a usable fixture? [189]

A. That is true.

Q. And both those variants would affect the number of transverse louvers we would have in a given length of fixture? A. Both of them would.

Q. Is there anything critical in the number of transverse louvers, numbering 13, that are employed in the plaintiff's fixture Plaintiff's Exhibit 13?

(Testimony of Bertram A. Kaepfel.)

A. No, sir, there is not.

Q. Would a usable fixture in your opinion have been provided by one having eight or nine transverse louvers? A. Yes, sir.

Q. Or 16 or 18 or 20 transverse louvers?

A. Yes, sir, it would have.

Q. Or any number in between those limits I have arbitrarily chosen, is that true?

A. Any number, yes, sir.

Q. Aside from the fact that the overall length of a fixture such as Plaintiff's Exhibit 13 must be sufficient to accommodate a 48-inch tube within it, is there any limit to the length, overall length of the fixture?

A. No, sir, there would be no maximum limit. There would be only a minimum.

Q. The fixture could be made longer than it is by as much as an inch or two inches or three inches and still have a [190] usable fixture, one of utility?

A. Yes, sir, even more than that.

Q. And it could be varied in increments of 1/16 or 1/8 of an inch or 3/16 up to several inches longer than it is now and still have a usable fixture?

A. Yes, sir.

Q. So if we varied it over a two-inch limit, its length of increments of a sixteenth of an inch, we would have 32 possible variants or overall lengths of fixture that we could employ and have a usable fixture of the type of Plaintiff's Exhibit 13?

A. That is true.

(Testimony of Bertram A. Kaepfel.)

Recross Examination

By Mr. Miketta:

Q. Mr. Kaepfel, did I hear you correctly in stating that there is no limit to the maximum length that the fixture can have, assuming that it originally was supposed to receive a 48-inch tube?

A. Well, that would be true aesthetically. Economically, perhaps not. There is a limit to the length of a piece of steel, and that would be the limitation on the length of a fixture.

Q. I think you said you could easily make [191] this four or six inches longer. Could you make it two feet longer?

A. If it were desired, yes, sir, it could.

Q. And all you are interested in, of course, in view of the experience that you have had in tool making, is the aesthetic appeal, is that right?

A. In a fixture of this type, yes, sir. [192]

Q. And if you were to put, let us say, a 48-inch tube in a fixture that is 6 feet long, and you put those fixtures in an adjacent aligned relationship, then you think you will have uniform lighting; is that correct?

A. Not necessarily, no, sir.

Q. In other words, there is a limit to the length of the fixture, if you want efficient lighting?

A. If you want uniform lighting, then the statement is true, yes, sir.

Q. Now, you spoke of the various spacings between transverse baffles and various cut-off angles,

(Testimony of Bertram A. Kaepfel.)

and the effect of changing the height of the transverse baffle, its effect on the cut-off angle, and so forth. All those variables were known before 1942, weren't they? A. Oh, yes, no doubt.

Mr. Miketta: That is right. Thank you.

The Court: In the lighting industry have these units of lighting fixtures that take a 4-foot tube been fairly well standardized? For instance, take a factory or a work room with these lighting fixtures holding fluorescent tubes in a series, and if the owner of the building wanted to remove one and put in another one, has the size been fairly well standardized in the lighting industry, or what is the variation you find in the lighting industry, if you know, on [193] fixtures which hold a 4-foot tube?

The Witness: If I understand your Honor correctly, the answer would be that each individual manufacturer establishes his own standard in that respect, and that standard varies also as to whether the fixture is ornamental or whether it is purely a functional fixture for factory or industrial lighting. If I may elaborate on that, we have industrial lighting which runs $52\frac{3}{4}$ inches long for a 48-inch lamp. That is the standard that we established, but that was for industrial purposes only.

The Court: Does that correspond with a similar length on the part of other manufacturers for industrial purposes?

The Witness: To the best of my knowledge, it does not.

The Court: All right. [194]

* * *

PROFESSOR ROBERT L. DAUGHERTY
called as a witness by and on behalf of the plaintiff,
having been first duly sworn, was examined and
testified as follows:

The Clerk: Take the stand. What is your name,
please?

Direct Examination

The Witness: Robert L. Daugherty.

By Mr. Foster:

Q. Would you state your residence, and your
age, please, Professor?

A. I live in Pasadena, California, and I am
sixty-four years of age.

Q. You are a professor at the California Insti-
tute of Technology in Pasadena; is that correct?

A. I am.

Mr. Foster: Your Honor, I have had the priv-
ilege of examining Professor Daugherty as an ex-
pert, and I think it would save some time and also
avoid any impairment of his sense of modesty if I
read from another record what I know to be his
qualifications. May I do that?

Mr. Miketta: We will accept that.

The Court: That is satisfactory.

Q. (By Mr. Foster): I understand, Professor,
that you have graduated in Mechanical Engineer-
ing from Stanford University in 1909; that you

(Testimony of Robert L. Daugherty.)

were an instructor in Mechanical Engineering Laboratory at Stanford in 1909 and '10; that [195] you were Assistant Professor of Hydraulics at Cornell University from 1910 to 1916; Professor of Hydraulic Engineering, Rensselaer Polytechnic Institute from 1916 to 1919—that is spelled R-e-n-s-s-e-l-a-e-r, and I understand that even some graduates from that university cannot spell it; that you were Professor of Mechanical and Hydraulic Engineering and head of the Mechanical Engineering Department of the California Institute of Technology since 1919;

That you are a Fellow and past Vice-president of the American Society of Mechanical Engineers; Regional Advisor of the Engineering, Science and Management War Training, U. S. Office of Education for Southern California, Arizona, and New Mexico, and Western Texas from 1940 to 1945;

That you are the author of numerous books, including Hydraulic Turbines, published three times; Centrifugal Pumps; and Hydraulics, published four times, and that your books are used as texts in most engineering colleges, including Cal. Tech.;

That you are author of a section on "Pumps, Compressors, and Hydraulic Turbines" in "General Engineering Handbook," published in 1932 and 1940; that you are author of the textbook for the International Correspondence Schools on "Water Turbines;" and author of numerous technical papers;

That you were retained in a consulting capacity

(Testimony of Robert L. Daugherty.)

with the Metropolitan Water District on Pumps for the Colorado [196] River Aqueduct in 1933 to 1936; that you have been consultant with the United States Bureau of Reclamation on pumps for the Grand Coulee project on the Columbia River from 1938-40 and 1946-47; and consultant for the Denver & Rio Grande Railroad on ventilation of the Moffat Tunnel, which is the longest tunnel in the world using steam locomotives; that you are consultant for the Union Oil Company, Riverside Cement Company, Goulds Pumps of Seneca Falls, New York; General Petroleum Corporation, and many others, and chairman of the Advisory Committee to the Board of Directors of the Air Pollution Control District here. Is that all true, and are you that Professor Daugherty?

A. Yes, sir. That is the record. [197]

The Court: Did you ever write a book on the laws of chance?

The Witness: No, I didn't write such a book.

Q. (By Mr. Foster): But did you make any calculations in response to a request from me, Professor, on the laws of chance as applied to a determination mathematically on whether if we had five, six, seven, eight, or nine dimensions or numerical values, and with respect to each one we had only two possibilities, one, a possibility of making that dimension a given value, and, two, a possibility of making it just one other value, and determine what the mathematical possibility of our having eight dimensions identical would be, that is, if we had

(Testimony of Robert L. Daugherty.)

eight dimensions of two different designers of a lighting fixture, for example, which were identical, and we had only two possibilities for each dimension, what is the probability of that being coincidental?

A. Yes, I have made such a calculation.

Q. Would you explain what the calculation or the formula for it involves, and in that regard if you would like to approach the blackboard and show us what is to be done, will you please [198] do so?

* * *

The Witness: The mathematical calculation of probability and chance is very simple, and one about which there is no question, but I think it might be helpful if I would illustrate it by a very simple example.

Suppose that in a bag, we will say, there was one white ball and one black ball, and that a person were just to reach in the bag and to pick out any ball. The chances that it would be the white one would be one out of two. If in another bag there were three white balls and seven black balls, and again at random one were to pick out a ball, the chances that it would be a white ball would be three out of ten. If in a third bag there were two white balls and twelve black ones, the chances you would pick out at random a white ball would be two out of fourteen.

Now, if at random one were to reach his hand

(Testimony of Robert L. Daugherty.)

in each one of these bags and pick out a ball, the chances of all of them being a white ball would be obtained by multiplying these numbers together, and the answer is six divided by 280. That is, the chances of picking out three white balls at random out of the three bags would be six out of 280. And that is the only principle that is involved in all of these other subsequent calculations.

Mr. Foster: Thank you, sir.

Q. (By Mr. Foster): Now, I have here, Professor Daugherty, and it is before the court, the two-and-one-half page report on your stationery which you gave me day before yesterday, that is marked tab J of Plaintiff's Exhibit 11. I show you a copy of it, and is that two-and-one-half-page report one prepared by you.

A. Yes, that was prepared by me.

Q. Are the mathematics in that report correct?

A. They are.

Q. What figure did you get, assuming that we had eight identical dimensions in two different devices and assuming with those eight dimensions that each of them had only two possible values, one, the value that the dimension actually was given in the device, and, two, just one other possible value, what was the probability of two devices having the eight dimensions identical being coincidental? [200]

A. That would be your first number on the board, one-half multiplied by itself eight times, and the answer would then be 256; that is, there is one chance

(Testimony of Robert L. Daugherty.)

in 256 that all eight dimensions would be identical if there were only two choices for each one.

Q. Now, in this report, Professor, assuming that the smallest—or, suppose that one of those numbers, one of those eight could be any one of fifteen possible variations, and suppose we had nine dimensions that are identical, and each of the eight other dimensions could be only one of two possible dimensions, again. What would be the probability of the nine dimensions being identical in two devices, being coincidental or accidental?

A. Well, in those calculations the first fraction would be one over 15. The other would be one over 2, and that multiplied by this eight times, and that would be one chance in 3,840.

The Court: How do you arrive at the 15 to start with?

The Witness: Well, that was just a mere assumption that in one case in this case the number of louvers, which happens to be 13, might be either a greater or a smaller number than that. And, of course, as soon as I get beyond this one to two, I have to make some kind of an assumption. One is, which I made here, that there could be at least three and at most seventeen, and, to have the chance [201] that it would be thirteen louvers instead of anything between three and seventeen would be just one chance in fifteen. For all of the rest of them I still stuck to the first assumption, that it was either the one dimension or some other dimension.

(Testimony of Robert L. Daugherty.)

Mr. Foster: Does that answer your Honor's question?

The Court: Well, it answers it, although I still don't know exactly how the figure 15 comes into it. That is figured out by some other formula?

The Witness: No. You see, if there could be three louvers, or four, five, six, seven or eight, on up to seventeen——

The Court: There would be fifteen possibilities.

The Witness: ——fifteen possibilities, and there would be only one out of fifteen that it would be thirteen. That is how it was arrived at.

Q. (By Mr. Foster): So that, as I understand you, Professor, if we have eight dimensions which are identical, and we assume that those dimensions, each of them, has only one possibility that it can be the value it is or only one other value, then our formula for determining what is the probability of the two devices having the eight dimensions identical is one-half times itself eight times?

A. That is correct. [202]

Q. And if any one of those dimensions could have been not one out of two possibilities, but one out of eight possibilities, we would then substitute for one of the one-halves in the formula, one over eight?

A. That's right.

Q. And multiply it by one-half the remainder of the times or seven times to get that probability?

A. That is correct.

Q. And if another of the dimensions could have been any one of 15 possibilities instead of two pos-

(Testimony of Robert L. Daugherty.)
sibilities, we would substitute in the formula for one over two on one occurrence one over 15?

A. That is correct.

Q. And that would give us the mathematical chance of the identity of the two devices being accidental or coincidental, is that correct?

A. That is correct.

Q. Then I notice that in your report on page 2 you have assumed at the bottom of page 2 possible variations, and you got seven possible values that could have been chosen for one of these items and then determine the probability from that, and I notice on page 3 you have extended the same line of reasoning to the remaining five dimensions and there you have made the assumption that there are seven possible values that could have been selected for seven of the dimensions, 15 [203] possible values that could have been chosen for one and only two possible values that could have been chosen for another, the last one? A. That's right.

Q. And determined that the chance of the nine dimensions or measurements being identical in two devices, being coincidental or accidental, is one out of 24,706,290, is that mathematically correct?

A. That is the correct figure.

Q. I call your attention to the fact, Professor, that listed in this Plaintiff's Exhibit 11 in the next lettered tab K there is a title which I wish to call to your attention, "Some Identities of Patented and Accused Designs," and that lists 24 items. Have you calculated what the chance is of two devices being

(Testimony of Robert L. Daugherty.)

identical in 24 dimensions or respects, assuming that as regards to each there are only two possibilities of the dimension having a value, that is, one the value it has, and, two, some other value, but only two possibilities?

A. That is correct, I have made such calculation.

Q. What does that calculation show as the probability, or I should say improbability—what is the chance of two features being identical in 24 respects under that assumption?

A. For 24 different respects where there are only two [204] possibilities for each one of the 24, the chance is one in 16,777,216 that they will be identical in all 24 respects.

Q. One other question, Professor. I direct your attention to a light fixture here, which is Plaintiff's Exhibit No. 15, and wish you to observe only its general shape, the kind of device it is, it is for lighting with fluorescent tubes, as you can obviously see. If I told you that as regards the dimensions and angles of the edges of the end of that fixture and its overall length and height and location of a decorative piece on its sides there were eight or nine respects in which that fixture was identical with a fixture for the same purpose, but manufactured by a different company, would it be your opinion, based upon your years of experience in design work both in teaching and making designs that such identities were accidental or coincidental?

A. I don't see how they could possibly be accidental.

(Testimony of Robert L. Daugherty.)

Mr. Foster: The report of Professor Daugherty which he has identified and which is tabbed, the two and a half, three pages of it, tabbed I of Plaintiff's Exhibit 11, is offered in evidence at this time.

The Witness: Isn't it G?

Mr. Foster: It is tab J.

The Court: It may be received in evidence. [205]

* * *

Mr. Foster: I would like to also offer as Plaintiff's Exhibit next in order, your Honor, the enlarged chart, which is merely an enlargement of the print which is found in Plaintiff's Exhibit 11 as tab I.

In case there is an appeal here, reference could be made to it before the Appellate Court.

The Court: 11-I is already in evidence.

Mr. Foster: I would like to offer the enlargement for reference purposes.

The Court: All right.

The Clerk: Plaintiff's Exhibit No. 16.

* * *

Q. With further reference to the fixture, Professor, to which I directed your attention, Plaintiff's Exhibit 15, I show you Plaintiff's Exhibit 16, which is an outline in solid lines of the end plate of the fixture design, and in dotted lines the outline of the end plate of a similar fixture manufactured by a different company, and state to you that in both of these fixtures the number of transverse louvers is

(Testimony of Robert L. Daugherty.)

13, and in both of them the overall length is 48-7/16 inches, and call your attention to the fact that these outlines, the [206] solid line outline and the dotted or broken line outline not only are almost identical, but that the angle relationships and dimensions indicated in 1, 2, 3, 4, 5 places are identical, and that not indicated by any arrow, but nevertheless a fact, is the vertical sidewalls upon the upwardly projecting portion of the top in each device, and ask you based upon your years of experience in teaching design and designing devices whether it is your opinion that such identities of angles and dimensions and number of louvers and lengths is likely to be coincidental or accidental?

A. No, I don't think it is probable.

Mr. Foster: That is all.

Cross-Examination

By Mr. Miketta:

Q. Professor Daugherty, I feel very much at a loss cross examining on a subject such as this form of mathematics, but may I approach it from this standpoint? Have you made a study of lighting fixtures, Professor?

A. I have not.

Q. In other words, you are approaching this from a purely mathematical standpoint?

A. Absolutely.

Q. And your opinion is based upon the assumption that certain facts and figures which have been presented to you are correct? [207]

(Testimony of Robert L. Daugherty.)

A. That is true.

Q. We will get along very much better because now we can talk the same language.

There may have been in the past, and I say "may" and if you were to assume that in the past there have been lighting fixtures of similar contour and of similar sizes, then your mathematics are just as correct as if there had never appeared previously fixtures of the same size and of the same contour, isn't that correct?

A. I believe that is true, if I understand your question.

Q. In other words, your mathematical computations do not take into consideration the possibility, let us say, that in the past, say back in 1942, fixtures were in existence that had the same contours or cross-sections and substantially the same angles as indicated on Exhibit 16.

A. No, I have made no study of the prior art, not even of the patents in this particular case. I have just simply calculated by laws of probability and chance what these possibilities are that have been submitted to me.

Q. I think you have been very wise to keep away from the patents or I would have cross examined you on that, because those I know.

Isn't it true in this example that you have given about the white marbles and the black marbles that there is a defect [208] in that method inherently, because suppose the black marbles are lots heavier than the white marbles.

(Testimony of Robert L. Daugherty.)

A. Well, that wasn't part of the assumption at all.

Q. But assuming that they were.

A. If that were the case one might tell by feeling that there was a difference. If a man were blind-folded, for example, and he picked up one, he couldn't tell in any way. This is just a mere chance.

Q. I am saying if the black ones were square or heavier than the white ones.

A. That takes out all elements of chance if some were square and some were round.

Q. That takes out the element of chance and, therefore, if some of those possibilities, let's call them, instead of marbles, are not only of unequal value but by reason of their utilitarian function they are very important, then of course the mathematical equation which you have used, the mathematical method which you have used, is not applicable, is that correct?

A. That may be true. That, of course, however, is not my problem in this case.

Q. No. All I know about this subject, Professor, I have learned by reading your report, the Encyclopedia Britannica, and one work on the law of chance and probabilities. But this heavy marble business is one that stuck in my mind, [209] because even I can understand that.

You were supplied with all this information, were you not? A. Correct.

Q. Did you make any of these measurements yourself? A. I did not.

(Testimony of Robert L. Daugherty.)

Q. You are not responsible if, for example, Exhibit 16 is slightly in error? A. No.

Q. Very well. You do state on page 2 of your report, "The bottom of the two fixtures is a V-shape with an angle from the horizontal of $71\frac{1}{2}$ degrees."

Did you actually measure the angle?

A. No. I was supplied with that information. I could see that it was V-shaped.

Q. But that angle you did not measure yourself?

A. No, I didn't. I didn't measure anything. I just simply observed the drawing, such as the one that is in evidence down here as Exhibit 16. That is what was shown to me.

Q. Professor, you have probably seen during your stay in the court room the two end portions of the plaintiff's device and of the defendant's device, and I am referring to Exhibits 13 and 15; can you observe a difference in the formation of the design appearing on those two end portions? [210]

* * *

The Witness: Yes, I observe a difference in the appearance of the ornamental features, if that is what you have in mind.

Mr. Miketta: Yes, Professor.

Q. Can you express mathematically the number of variations which could exist between the design appearing on Exhibit 13 and the design which appears on Exhibit 15?

A. As far as that appearance is concerned, do you mean?

(Testimony of Robert L. Daugherty.)

Q. Yes, how many variations could exist between what is shown on Exhibit 13 and what appears here?

Mr. Foster: That is objected to as being ambiguous. I don't understand it at all. But if the witness does, he can answer it.

The Witness: I think there can be an indefinite number of variations in those little details of the ornamentation.

Q. (By Mr. Miketta): Not only indefinite, but almost infinite?

A. Yes. Of course, my calculations were on more or less definite physical measurements that were given to me.

Q. And if the number of variations is infinite, then of course the chance of duplicating them is also infinite isn't that right?

A. One in infinity.

Mr. Miketta: Thank you very much. [212]

* * *

LOUIS J. ROZIER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Foster:

Q. State your full name, please.

A. Louis J. Rozier.

Q. Your residence, please?

A. Kirkwood, Missouri.

(Testimony of Louis J. Rozier.)

Q. Are you an employee of the plaintiff, the Day-Brite Lighting, Inc.? A. I am.

Q. How long have you been employed by the plaintiff? A. Since August of 1937.

Q. In what capacity are you employed?

A. Advertising and sales promotion manager.

Q. Do you have anything to do with the contact work with advertising agencies which prepare the copy for advertisements of the plaintiff's products?

A. It is my responsibility.

Q. Do you have anything to do with the literature, price lists, bulletins, printed for Day-Brite with respect to [214] the lighting fixtures it makes and sells?

A. I create them and supervise their production.

Q. Do you have anything to do with the art work that is used in the literature and advertisements of lighting fixtures of the plaintiff?

A. I supervise its production.

Q. What is the size of the department you supervise?

A. It includes an assistant, a secretary, two artists and two clerks and myself.

Q. With regard to the creative work of advertising and exploitation, and the creation and maintenance of a market for the Viz-Aid patented design fixture by Day-Brite, the plaintiff, have you had anything to do with that?

(Testimony of Louis J. Rozier.)

The witness: Yes, sir, everything that had to do with the advertising and promotional end of it.

Q. (By Mr. Foster): Are the records which show the expenditures made in the advertising of the Viz-Aid fixture, Plaintiff's Exhibit 13, in your custody in your department?

A. The figures on the advertising have passed through my department, yes.

Q. And have you prepared, in response to my request, any summary of the literature costs and advertising of plaintiff's [215] fixture marked Plaintiff's Exhibit 13?

A. I have.

Q. I show you a volume marked Plaintiff's Exhibit 6 for identification and ask you if that is what you had reference to in your last answer?

A. Yes, this is the book that I prepared or supervised the preparation of.

Q. The one that I have handed you is the court's copy. I will return it to the clerk and ask you to direct your attention to my copy of that book. I notice that there are tabbed in it a number of separate sheets. Will you direct your attention to tab A and explain what is there shown?

A. Tab A contains a summary of Viz-Aid advertising costs itemized by agency expenses through 1945, '46, '47, '48 and part of '49, plus the literature printing costs for the Viz-Aid advertising material, totaling in excess of \$88,000.

Q. And tab B of Plaintiff's Exhibit 6, what is there shown?

(Testimony of Louis J. Rozier.)

The Court: Counsel, you are talking about Viz-Aid. Is there any stipulation that this light fixture, Plaintiff's Exhibit 13, is the Viz-Aid light?

Mr. Foster: There is no stipulation on that as yet.

Do you so stipulate, that Viz-Aid is the Plaintiff's Exhibit 13, Mr. Miketta. I have here all the [216] bulletins.

Mr. Miketta: It is my understanding, your Honor, that the plaintiff corporation has called this fixture of theirs, Exhibit 13, by the trade name Viz-Aid, and I think I will accept the witness' statement to that effect.

Q. (By Mr. Foster): That is true, isn't it?

A. That is true. It is a registered trademark.

Q. For the lighting fixture Plaintiff's Exhibit 13 which you have seen here in court, is that correct?

A. That is correct. [217]

* * *

Directing your attention to tab B entitled "Viz-Aid Literature Costs," in Plaintiff's Exhibit 6, what is there shown?

A. That is a breakdown of the cost of the individual bulletins that have been published promoting the sales of the Viz-Aid.

Q. Those individual bulletins are then bound in this Plaintiff's Exhibit 6 and tabbed as I, J, K, L, M and N, is that correct?

A. That is correct.

Q. And each of these bulletins that I have last referred to depicts and advertises only the Viz-Aid

(Testimony of Louis J. Rozier.)

and Topnotch—principally Viz-Aid lighting fixture like Plaintiff's Exhibit 13?

A. Principally, yes.

Q. Each of these bulletins that I have referred to has also, appearing on the lower left-hand corner of its back cover, the approximate date of printing and distribution, and the number of copies of each bulletin which were made?

A. In some place in the bulletin, not always the same positions. [220]

Q. Some places it occurs inside the front cover at the lower left?

A. That is correct.

Q. In one place or another it shows that 50,000, or whatever the number was, was distributed?

A. That is correct.

Q. And the cost of these bulletins is what you have set forth on sheet B of Plaintiff's Exhibit 6; is that correct?

A. That is correct.

Q. And all of those literature costs total \$9,600.71, as shown on sheet A of Exhibit 6?

A. That is correct.

Q. Turning now to sheets which are marked O, AA, AB, and through AS, there is listed for each year the amounts paid for advertising space and production to the agencies named upon that sheet, for advertising of the Viz-aid lighting fixture by the plaintiff, like Plaintiff's Exhibit 13; is that correct?

A. That is correct.

(Testimony of Louis J. Rozier.)

Q. And that amount is summarized upon sheet A of Plaintiff's Exhibit 6 in that total; is that correct? A. That is correct; yes, sir.

Q. And those figures and compilations upon the sheets I have referred to you have checked from the records [221] ordinarily kept and passing through your hands and in your custody at the company; is that correct?

A. That is correct.

Q. Would you explain the nature of the records from which these compilations were made?

A. The court's copy contains typical purchase orders and invoices covering the production of various ads and tear sheets of the ads in those cases follow these typical invoices. The space cost in the publication can be picked up from the agency invoices, as typical of what these costs are. The space costs are available. Anyone can find them through the Standard Rate and Data Service, and, of course, the space costs are published and are the same to everyone. It is billed to everyone through the agency.

Q. And those records you have identified were used, therefore, in checking the accuracy of this figure of \$88,046.73 on tab A of Plaintiff's Exhibit 6? A. Correct.

Q. And that is the expenditure made by the plaintiff for the years 1945 through the first three months of 1949? A. That is right.

Q. In advertising its Viz-aid lighting fixture, Plaintiff's Exhibit 13; is that correct?

(Testimony of Louis J. Rozier.)

A. Correct; yes, sir.

Q. Now, I wish to show you—— [222]

The Court: Just a moment. Do I understand that was all spent just in advertising this one fixture, the 48-inch fixture, with—what is it?

The Witness: Two tubes.

The Court: ——two tubes?

The Witness: That is correct.

The Court: And other amounts were spent by your company for advertising 18-inch, 24-inch, and 36-inch fixtures?

The Witness: Not as such. Other amounts were spent by the company for advertising other fixtures of 48-inch and 60-inch size. The 18, 24 and 36-inch lamps are strictly general. So far as promotion and advertising, they are cataloged, but they are not picked for advertising.

The Court: Then you had a cost distribution system so as to apportion to the various fixtures that you put out the particular costs of advertising, so that you could allocate to this particular fixture which is Plaintiff's Exhibit 13 in evidence the cost to that fixture?

The Witness: It wasn't done actually on an allocation basis, but these costs summarized were pulled from the tear sheets of the advertisements. You will see later in another exhibit—you will see in two later volumes that those ads were devoted exclusively to the Viz-aid fixture.

(Testimony of Louis J. Rozier.)

The Court: What do you mean, the Viz-aid [223] fixture?

The Witness: That is the two-lamp 48-inch, until the two 100-watt fixture was announced of the same design. I believe some of those ads will indicate in them specifically the amount where it was two 40-watts, or 100 watts, or whatever it was.

Q. (By Mr. Foster): Is my understanding correct, referring to this tab A of Plaintiff's Exhibit 6—— A. That is B.

Q. ——that the agency costs that are listed there related to the tear sheets which appear in the volumes marked Plaintiff's Exhibits 7 and 8, for identification? A. That is correct.

Q. And the amounts expended, as shown, to the agencies on that tab sheet A of Plaintiff's Exhibit 6 were for the advertisements represented by the tear sheets in the two volumes, Plaintiff's Exhibit 7 and 8, for identification?

A. That is correct.

Q. Where did these tear sheets in Plaintiff's Exhibits 7 and 8, for identification, come from?

A. They came from my office records or scrap-books that we try to keep of all of the publications in which we advertise. We don't catch them all, but we catch all that come over our desks where we normally receive tear sheets.

Q. I notice that many of the tear sheets have the name of the magazine and the month and year of

(Testimony of Louis J. Rozier.)

the publication, [224] and that those that do not have some pencil notation on the margin, or ink notation. Who places the notation in handwriting upon the tear sheets?

A. Whoever is clipping the ads in the department. Those are not mine, particularly. That is the clerical help that clips the magazines as they come through.

Q. But the longhand notations on the tear sheets in these volumes, which are Exhibits 7 and 8, for identification, are put on in your department?

A. That is correct.

Q. And they are made pursuant to your direction, that they should do so?

A. That is correct.

Q. And the tear sheets are kept in your department pursuant to your instructions and directions?

A. That is right.

Q. And you bound these tear sheets, taking them from your office, into these volumes, Plaintiff's Exhibits 7 and 8, for identification?

A. That's right.

Q. To the best of your knowledge, except for the pencil or ink longhand notations indicating the title of the magazine and the day and month of the publication, are these tear sheets all in the exact form in which they were published in the magazines identified on them, in the month and year [225] indicated thereon?

A. That's correct.

Mr. Foster: The two volumes identified by the witness, marked Plaintiff's Exhibits 7 and 8, for

(Testimony of Louis J. Rozier.)

identification, are offered in evidence as Plaintiff's Exhibits of the same number, your Honor.

The Court: They will be received in evidence.

* * *

Q. (By Mr. Foster): Now, I direct your attention, Mr. Rozier, to tab AY of Plaintiff's Exhibit 6, for identification, and ask you what is there set forth.

A. That is a summary of Viz-aid sales from the beginning in 1945 through the first three months of 1949. The national figures are given in units and dollar value in the [226] first two columns, following the year date. The California sales in units and dollar value are in the next two columns, and the per cent of California sales to national sales is given in the last column.

Q. And those on the sheet AZ, what is there shown?

A. That is the California breakdown by months of 1945, which is summarized on the previous sheet.

The Court: I can see that this exhibit has not been inspected by the Chamber of Commerce. Your reference there to Lower California would bring you into great disgrace in this community.

The Witness: I apologize for that.

The Court: Lower California is the peninsula that is below the border. This is Southern California.

Q. (By Mr. Foster): By "Lower California," as you have used it, is meant a part of the State of California, the southern part of it, isn't it?

(Testimony of Louis J. Rozier.)

A. That is correct.

Q. And by "Upper California" you meant the part of the State of California which is the northern part?

A. Yes, sir.

Q. Perhaps the least significant part. Is the next sheet, which is tab BA of Plaintiff's Exhibit 6, for identification, a similar summary for the year 1946?

A. That is right. [227]

Q. And the 1947 summary is tab BB?

A. Yes.

Q. And the 1948 summary is tab BC?

A. That's right.

Q. And the first four months of 1949 is tab BD?

A. Yes.

Q. What is tab BE?

A. BE are the national summaries for the year 1945, broken down into types of Viz-aid fixtures, that is, the 40-watt and the 100-watt, and the later developments. This is set up in a standard form.

Q. And the amounts of the sales in units and sales value are set up there?

A. That's correct.

Q. And tab BF is the same for 1946?

A. Yes, sir.

Q. And BG the same for 1947?

A. Yes, sir.

Q. And tab BH the same for 1948?

A. Yes, sir.

Q. And tab BI is for the first three months of 1949?

A. That's right.

Q. Were these compilations appearing on the sheets marked AY to BI of Plaintiff's Exhibit 6, for

(Testimony of Louis J. Rozier.)

identification, prepared by you or under your [228] direction?

A. They were prepared at my request, under the direction of the office manager, because I have nothing to do with the sales records as such.

Q. What records were employed and did you check these figures against?

A. These were taken——

* * *

Q. (By Mr. Foster): Did you make a check to determine that these records or the summations are at least approximately correct, Mr. Rozier?

A. Yes, sir.

Q. And against what records did you check the figures?

A. I made a spot check of the 1945 figures against the cost of sales sheets I obtained from the office. I made a check of the California figures for 1949 against actual salesmen's commissions' copies.

Q. Did you make any check against these cards, inventory records?

A. I also checked all of the figures against copies of our inventory control cards, which are made up on the basis of fixtures put into manufacture.

Q. Those inventory control cards you refer to are these [229] cards which are tabbed BJ of Plaintiff's Exhibit 6, for identification; is that correct?

A. That is correct.

Q. Then appearing here as tab BK is a statistical bulletin, or, would you state what that is?

A. That is a copy of the National Electrical

(Testimony of Louis J. Rozier.)

Manufacturers Association Monthly Report, submitted to us, and the BK tab covers the introductory sheet or first sheet, indicating the companies participating in this report.

Q. Including the plaintiff corporation?

A. That is correct.

Q. And tab BL?

A. BL is the actual report of sales of fixtures under various classifications.

Q. Including a classification which includes the Viz-aid fixture, Plaintiff's Exhibit 13?

A. That is correct. That is considered a two-lamp shielded fixture.

Q. And so identified upon the tab BL?

A. That is correct.

Q. The tab BL, as I understand you, gives the national sales of all of the companies which are members of this organization and listed upon tab BK?

A. All of the company members who are represented.

The Court: Are those in units rather than in dollars? [230]

The Witness: Those are in units, yes, your Honor.

Q. (By Mr. Foster): This report, tab BL, and similar reports from the same company or association, are they used by you and your company in the usual course of business in comparing your company's sales of the Viz-aid fixture like Plaintiff's

(Testimony of Louis J. Rozier.)

Exhibit 13 with the number of sales of units of the same class nationally by the members reporting?

A. That is correct.

Q. And that such use by you and your company is in the ordinary course of business?

A. That is correct.

Q. Now, appearing upon tab BM of Plaintiff's Exhibit 6, for identification, is what?

A. That is a chart of the Viz-aid sales fluctuations by years, given in units in percentage, of Day-Brite Viz-aid sales nationally, of Day-Brite California sales in units and percentage, and the last column indicates the trend of general fluctuation taken from the report which was just shown, by NEMA.

Q. Now, with respect to California do you find that there is a fluctuation different from the fluctuation in the sales of such devices nationally?

A. Yes.

Q. Explain what the difference is.

A. Do you want me to go through the entire thing ? [231]

Q. In general, to show what it was.

A. It indicates here from 1947 to 1948 Day-Brite's Viz-aid business nationally dropped 4.4 per cent. The California drop was 41.4 per cent.

The national drop, as far as NEMA was able to report, was an increase of 10.7 per cent.

The Court: Does that 10.7 per cent apply to an increase in general business conditions, or just lighting fixtures?

(Testimony of Louis J. Rozier.)

The Witness: Just to lamps reported to NEMA.

Q. (By Mr. Foster): Of just one particular class?

A. Just one particular class of units.

Mr. Foster: The significance of that, we will urge, your Honor, is that while the plaintiff's sales of Day-Brite fixtures fell off only four per cent nationally in 1948 over 1947, it fell off in California 41.4 per cent, which we attribute to the defendant's sales of the infringing fixture, whereas the national sales of all such class of fixtures by all of the large companies combined increased actually 10.7 per cent.

Q. (By Mr. Foster): Would you explain what is shown—or, was this compilation on tab BM on Plaintiff's Exhibit 6, for identification, prepared by you?

A. This compilation was prepared by me from the previous figures shown.

Q. What is shown on tab BN, Mr. Rozier? [232]

A. BN are the same figures resolved into chart form, to be more visual. The units are broken down in the left-hand column at 4,000 per line. The years are shown across the bottom, and we have actually plotted this as against the unit figures, with the exception of the NEMA figure, which you will see as a dotted line. And I have taken the multiple of 10, so that the NEMA figure starts just below the Viz-aïd figure of 40,000, but that actually indicates 400,000 on the NEMA figure. It just so worked out,

(Testimony of Louis J. Rozier.)

and by using the multiple of 10 I was able to get it in to show the trend.

Q. So this graphically shows that the drop in business, in selling the Viz-aid fixture like Plaintiff's Exhibit 13 in California in 1948 over 1947 was much greater than such a drop in the plaintiff's business nationally, and contrary to the general trend——

A. That is correct.

Q. ——of sales nationally by all of the big manufacturers of such fixtures of such class?

A. That is right. [233]

* * *

Q. What is shown on tab BO of Plaintiff's Exhibit 6, [234] for identification?

A. BO is a reproduction of an Electrical Testing Laboratory report on one of the tests of our Viz-aid fixture. The particular test is of the suspension with the two 40-watt tubes.

Q. Are the reports on tabs BP, BQ, and BR, reports on fixtures of the plaintiff like Exhibit 13 by the same laboratory?

A. That is correct.

Q. All paid for by the plaintiff?

A. That is correct.

Q. And were the reports circulated in establishing sales?

A. They have been reproduced in the form you see them and distributed through our representatives and distributors.

Q. Referring to tabs BT, BU, BV and BW, are they examples of other literature distributed by the

(Testimony of Louis J. Rozier.)

plaintiff to its salesmen for their use and distribution to others with respect to the sales of its products, including the Viz-aid fixture like Plaintiff's Exhibit 13? A. That is correct.

The Court: BS also is in that category, I take it?

Q. (By Mr. Foster): BS also; that is true, is it not? A. Yes, sir.

Mr. Foster: Now, the whole book, your Honor, with all [235] of its tabbed material and summaries extending from tab A through tab BW is now offered in evidence as Plaintiff's Exhibit 6.

Mr. Miketta: May the court please, I would like to check that. It was not all marked with these various tabs, and I would like to check that during the recess for a few minutes, before your Honor rules on that.

The Court: We will take a recess at this time for a few minutes, and you may check the exhibit.

Mr. Miketta: Thank you, your Honor.

The Court: Is the Day-Brite Company one of the biggest manufacturers of this type of lighting fixture?

The Witness: As far as we can determine, we are among the ten largest in the NEMA group; as far as we can determine.

The Court: Well, making a very fast comparison of your last sheet, I think it was in the year 1948, out of 438,000 units of the Viz-aid style apparently your records show you sold 93,000?

The Witness: Yes, sir.

The Court: Does that sound about right?

(Testimony of Louis J. Rozier.)

The Witness: That is about right.

The Court: About a little less than one-fourth of the total number of the units sold.

Mr. Foster: That is of that particular class of fixture. [236]

The Court: Yes, of that particular unit.

The Witness: That is about it. The sale was right around 100,000 fixtures, and the NEMA figures given to us were about 400,000.

The Court: Then if you say you are one of the first ten,—

The Witness: So far as we can determine, yes, sir.

The Court: —is there any organization manufacturing these lighting fixtures that is bigger, that has a larger sales volume than your concern?

The Witness: I don't know the actual figure, but Sylvania is larger than we are.

The Court: You might be one of the first ten, and be No. 1, you know.

The Witness: We don't know that we are No. 1. Those figures are not given among the lighting industry.

Mr. Foster: I might say that I understand, your Honor, that to the members of this organization there is mailed a request for information, which is mailed to a receiving agency, and not to the association itself. The receiving agency learns the sales of each of its members through these reports, but does not report from one member to another. It merely sends a card or notice to the association itself that

(Testimony of Louis J. Rozier.)

the member has reported, but does not say what it has reported. Then they make a composite here of all the figures, [237] substantially, so the members know only what they sold and what the total is that all the members sold, but they cannot tell whether they sold more than anyone else. There isn't any record, from which the witness can answer your Honor's question, and the information regarding sales as to each company reported to the association is precluded because of secrecy.

The Court: Then you have to take it the way I did, take your sales as compared to the others?

The Witness: That is correct.

The Court: And then it would not be a complete answer because this particular organization only embraces in its scope some thirty-five companies, and there would be a large number of smaller companies not belonging to the association?

Mr. Foster: This association is only represented as sixty per cent.

The Witness: As far as they can give us, it is about sixty per cent of the industry. [238]

* * *

Q. (By Mr. Foster): Mr. Rozier, to the best of your knowledge are the salesmen of the plaintiff company paid any greater commission on their sales of the Viz-Aid fixture, Plaintiff's Exhibit 13, than on other fixtures of the plaintiff corporation?

A. No.

Q. And the salesmen receive their entire remuneration from commissions, don't they?

(Testimony of Louis J. Rozier.)

A. That is correct.

Q. Are the architects or wholesalers who buy the Viz-Aid fixture, Plaintiff's Exhibit 13, allowed any greater discounts by the plaintiff company from list on that fixture than they are allowed with respect to other Day-Brite fixtures? A. No.

Q. Is there any inducement of any kind, financial or otherwise, offered by the plaintiff corporation to its salesmen or any of the purchasers to induce the sales of the Viz-Aid patented design fixture like Plaintiff's Exhibit 13 preferentially as regards other lighting fixtures sold by plaintiff company?

A. No.

Q. To the best of your knowledge, have there been any re-orders from the same wholesalers and architects of the Viz-Aid fixture, Plaintiffs Exhibit 13? [239] A. Yes.

Q. Are all of the fixtures, lighting fixtures, of the plaintiff corporation sold by it to wholesalers?

A. Exclusively, yes.

Q. The evidence here before referred to shows that the sales of the Viz-Aid fixture, Plaintiff's Exhibit 13, has greatly increased from the beginning. Has the number of wholesale outlets or buyers of fixtures from the plaintiff corporation increased in that period?

A. Our basic wholesalers have not increased in number, no, sir.

Q. The increase in sales, therefore, of the Viz-Aid fixture, Plaintiff's Exhibit 13, indicates re-orders by the same wholesalers, is that correct?

(Testimony of Louis J. Rozier.)

A. Yes, sir.

Q. Have you collected any illustrations of lighting fixtures of the general type and purpose of the Viz-Aid fixture, Plaintiff's Exhibit 13, as made independently by other manufacturers who have sold them?

A. Yes.

Q. Do you have such a collection before you?

A. It is here.

Q. That is Plaintiff's Exhibit for identification what number?

A. 9. [240]

The Court: That is in evidence, isn't it, Mr. Figg?

The Clerk: No. 9 is in evidence.

Q. (By Mr. Foster): Plaintiff's Exhibit 9, that is the collection of catalogs which you made?

A. That is correct.

Q. In those catalogs do you find that there are illustrated lighting fixtures of different manufacturers capable of using 48-inch tubes?

A. Yes.

Q. Fluorescent tubes?

A. Yes.

Q. Of different varying lengths and widths and depths?

A. Yes.

Q. Would you briefly refer to a few of those catalogs and point out the different dimensions for the width, length and depth there referred to?

And, if the court please, could we indulge your Honor's patience to utilize for a moment the court's book, because I didn't duplicate all of the catalogs in it for my book or Mr. Miketta's.

A. 49½ inches long, 9 inches wide, and 9 inches deep.

(Testimony of Louis J. Rozier.)

Q. That is which one?

A. No. 7183 Ruby Corporal. [241]

The Court: Under tab A.

The Witness: 9 inches wide, $6\frac{3}{4}$ inches deep by $49\frac{1}{2}$ inches long. Ruby No. 8077 Admiral.

This is $49\frac{1}{2}$ inches long, 15 inches wide, 8 inches deep. Ruby No. 7786, Louveron II.

Here is an 8-inch deep, 15 inches wide, $49\frac{1}{2}$ inches long. Another Ruby Louveron.

Under tab H we have the Garcy Challenger, $8\frac{1}{2}$ inches high, 15 inches wide, and there is no depth given on that. Rather, length, pardon me.

The Garcy No. 7780; 52 inches long, 7 inches high, $10\frac{3}{4}$ inches wide.

Emco——

The Court: Under tab H.

The Witness (Continuing): ——No. 4648, $49\frac{1}{2}$ inches long, 13 inches wide, 17 inches high.

Another Emco, No. 2048 G, 49 inches long, 10 inches wide, 5 inches high.

Dover Electrical Supply.

The Court: Under Tab H.

The Witness (Continuing): No. LF 154-48, 6 inches high, 11 inches wide, $49\frac{1}{2}$ inches long.

No. LF 234-48, 11 inches wide, 49 inches long.

Guth, No. M-2855, 8 inches high. There doesn't seem to be any other dimension. $48\frac{1}{2}$ inches long, $17\frac{1}{2}$ inches [242] wide by 7 inches high. That 8 inches was incorrect. That was evidently the stem.

Guth No. M-2850, $50\frac{1}{2}$ inches long, 15 inches wide, $8\frac{1}{2}$ inches deep.

(Testimony of Louis J. Rozier.)

Guth No. M-1970-W, 48½ inches long, 16 inches wide, 5 inches high.

Guth No. M-2290-W, 15 inches wide, 71½ inches high, 50½ inches long.

Do you think it is necessary to go through any more of these?

Q. (By Mr. Foster): I think that is sufficient, Mr. Rozier.

Mr. Foster: I had ordered Plaintiff's Exhibit 6, for identification, into evidence, before the recess, and you wanted to look up something.

Mr. Miketta: May the court please, I frankly don't see any objection. I have no objection to the introduction of the first two portions of that exhibit, but the figures relating to sales starting with that sheet AY are figures which the witness has not personally compiled. [243]

* * *

Mr. Foster: Mr. Rozier, in addition to the checking you have previously referred to in your testimony, you have checked sales figures against the commission sheets which are customarily kept by the company in the regular course of the business as their copies of the invoices mailed out and bearing on those copies the commission percentage, amount of commission, showing what is due and paid to the salesman, is that correct?

The Witness: Those were the commission copies covering the California sales for 1949, I believe it was, that I did check against the sales figures. I checked those personally.

(Testimony of Louis J. Rozier.)

Mr. Miketta: But not other figures? You didn't check any other figures of invoices?

The Witness: At the other end, that is, the 1945 sales, I have those rough sheets there which are our cost of sales sheets, I checked those against the 1945 sales. The interim periods I did not check, no, sir. They were prepared for me by the office.

Mr. Miketta: I am not pressing this objection; I am voicing the objection. I have it on the record. I will abide by your Honor's ruling. [244]

The Court: You say you are not pressing it but you are voicing it.

Does your company have a set of books in which there are listed the sales for each particular year?

The Witness: Not as such.

The Court: As to styles, such as Plaintiff's Exhibit 13?

The Witness: They have the cost of sales sheets where every sale is entered and our cost checked back against that, but they are lumped as they come through. They have commission copies by territories, but there is no general book that could be presented that would show we had sold so many for each of the periods involved.

The Court: The only way you could obtain that would be by a check made against commissions paid in each particular area?

The Witness: That is correct.

The Court: And then segregate sales concerning a particular unit?

The Witness: Yes.

(Testimony of Louis J. Rozier.)

The Court: That is what you have done?

The Witness: Yes.

The Court: You made a spot check of it?

The Witness: It was actually totaled. I made the spot check. [245]

The Court: I say you had it done and then you made spot checks?

The Witness: Yes.

The Court: Of the results?

The Witness: That is correct.

The Court: In view of the stipulation, counsel, as to damages, I am not going to admit this into evidence as having any bearing upon damages. I will, however, admit it into evidence under the theory that we have been talking about as indicating some probative value on the commercial success.

Mr. Miketta: Very well, your Honor.

The Court: Your objection, therefore, will be overruled in part and sustained in part.

The Clerk: Plaintiff's Exhibit 6 in evidence.

* * *

C*. Typical engraving invoice.

D*. Typical engraving invoice.

E*. Typical typesetter invoice.

F*. Typical electrotyper invoice.

G*. Typical electrotyper invoice.

H*. Typical printing invoice.

I. Bulletin No. 10-B.

J. Bulletin No. 10-B-1.

K. Bulletin No. 10-B-1, reprint.

L. Bulletin No. 10-B-3.

(Testimony of Louis J. Rozier.)

- M. Bulletin No. 10-B-5.
- N. Form OD 456.
- O. Advertising space and production Anfenger.
- P*. Typical Anfenger invoice.
- Q*. Anfenger ad production invoice.
- R*. Ad No. 93.
- S*. Anfenger invoice.
- T*. Anfenger production invoice.
- U*. Ad No. 98.
- V*. Anfenger invoice.
- W*. Anfenger ad production invoice.
- X*. Ad No. 100.
- Y*. Anfenger production invoice.
- Z*. Ad No. 107. [247]
- AA. Bloch Advertising Summary, 1946.
- AB. Bloch Advertising Summary, 1947.
- AC. Bloch Advertising Summary, 1947.
- AD. Bloch Advertising Summary, 1948.
- AE*. Bloch ad production invoice.
- AF*. Ad No. 900-A.
- AG*. Bloch ad production invoice.
- AH*. Ad No. 900.
- AI*. Bloch ad production invoice.
- AJ*. Ad No. 911.
- AK*. Bloch ad production invoice.
- AL*. Ad No. 318.
- AM*. Bloch ad production invoice.
- AN*. Ad No. 216.
- AO*. Bloch statement.
- AP*. Ad production invoice.
- AQ*. Ad No. 298.
- AR*. Ad space invoice.

(Testimony of Louis J. Rozier.)

- AS. Gardner Advertising Summary, 1949.
- AT*. Gardner production invoice.
- AU*. Ad No. 199.
- AV*. Gardner ad production invoice.
- AW*. Ad No. 249.
- AX*. Gardner ad space invoice.
- AY. Viz-Aid Sales Summary, 1945-1949. [248]
- AZ. Viz-Aid California Sales, 1945.
- BA. Viz-Aid California Sales, 1946.
- BB. Viz-Aid California Sales, 1947.
- BC. Viz-Aid California Sales, 1948.
- BD. Viz-Aid California Sales, 1949.
- BE. Viz-Aid National Sales, 1945.
- BF. Viz-Aid National Sales, 1946.
- BG. Viz-Aid National Sales, 1947.
- BH. Viz-Aid National Sales, 1948.
- BI. Viz-Aid National Sales, 1949.
- BJ. Copies inventory control cards.
- BK. NEMA membership list, December, 1948.
- BL. NEMA Statistical Bulletin, March 4, 1949.
- BM. Viz-Aid Sales Fluctuations.
- BN. Graph of Sales Fluctuations.
- BO. ETL Report No. 325634.
- BP. ETL Report No. 325631.
- BQ. ETL Report No. 315756.
- BR. ETL Report No. 315757.
- BS. ETL Sales Manual, Sheet 2-A-1.
- BT. ETL Sales Manual, Sheet 1-A-1.
- BU. ETL Sales Manual, Sheet 1-A-2.

*Copy for Court only. [249]

(Testimony of Louis J. Rozier.)

BV. ETL Sales Manual, Sheet 1-A-3.

BW. Bulletin, "It Happened in Denver Schools."

* * *

Q. (By Mr. Foster): I wish to direct your attention to the volume which is marked Plaintiff's Exhibit 11, for identification, and to tabs C, D, E, F, of that booklet. These are photographs, C being marked "Ruby Accused Paramount Fixture," D being marked "Plaintiff's Patented Viz-Aid Fixture," E being marked "Ruby Accused Paramount Fixture," and F being marked "Plaintiff's Patented Viz-Aid Fixture."

Two pictures were made of two different positions of each of the devices, your Honor.

Were these photographs made under your supervision and direction? A. Yes, sir.

The Court: Are the photographs which are tabs D and F photographs of Plaintiff's Exhibit 13 here in evidence?

The Witness: That is correct.

Q. (By Mr. Foster): And they accurately portray that exhibit? A. Yes.

Q. And are the photographs which are tabs C and E of Plaintiff's Exhibit 11 for identification photographs of the Ruby device which is Plaintiff's Exhibit 14 or 15? A. It is 14.

Q. Here in evidence?

A. The one that is mounted.

Q. And those photographs correctly depict [250] Plaintiff's Exhibit 14? A. Correct.

(Testimony of Louis J. Rozier.)

Mr. Foster: The photographs identified by the witness, identified as tabs C, D, E, and F, Plaintiff's Exhibit 11 for identification, are offered in evidence as Plaintiff's Exhibits 11-C to -F respectively. [251]

* * *

The Court: Exhibits for identification 11-C, -D, -E and -F are admitted in evidence.

* * *

Mr. Foster: Will you stipulate that G and H of Plaintiff's Exhibit 11, for identification, were distributed by the defendant prior to the filing of the complaint?

* * *

Mr. Miketta: They were printed and probably distributed [252] by the defendant.

Mr. Foster: I will offer the illustrations G and H as Plaintiff's Exhibits 11-G and -H, in evidence.

The Court: Received in evidence.

* * *

Q. (By Mr. Foster): Now, I wish to direct your attention, Mr. Rozier, to tab K of Plaintiff's Exhibit 11, for identification, where there is a title "Some Identities of Patented and Accused Designs."

May the record show that I pass over the first nine items there because those are the nine items I feel which are set forth as identical dimensions within working tolerances in Plaintiff's Exhibit 11-I.

(Testimony of Louis J. Rozier.)

I will ask you if you have checked the remaining items from 10 on and found the identities there identified in Plaintiff's Exhibit 13, that is, the Day-Brite fixture, and Plaintiff's Exhibits 14 and 15, the accused fixtures? A. I have.

Q. Will you take them up in order and refer to each? The first is No. 10. Is that illustrated, the identity of the entire outline of the end cap, in Plaintiff's Exhibit 11-I? [253]

A. Yes, sir, it is illustrated in the duplicate drawings.

Q. No. 11 is the lower decorative cap panel with its lower edge horizontal. What is indicated there?

A. They are identical as far as appearance is concerned. [254]

* * *

Mr. Foster: I offer it for that limited purpose, tab K of Plaintiff's Exhibit 11, for identification, into evidence.

The Court: It will be admitted into evidence as listing the contentions of the plaintiff of the identities of the patented [255] and the accused designs.

Mr. Foster: A and B are the patents in suit, and I think they were received in evidence. If not, I offer them at this time.

The Court: A and B will be received in evidence. They probably are duplicated in the file wrappers.

* * *

The Clerk: That means, then, that the entire Exhibit 11 is in evidence.

(Testimony of Louis J. Rozier.)

The Court: The entire Exhibit 11 is in evidence with the limitations heretofore placed upon it, except that its title should be modified. It now reads "Exhibits Establishing Infringement and Copying." It should read "Exhibits Contended by the Plaintiff to Establish Infringement and Copying."

Mr. Foster: Very well, your Honor.

The Court: I will add that on the front.

Mr. Foster: That concludes the direct examination, your Honor.

The Court: Likewise, on 11-K, that was admitted for the purpose of showing plaintiff's contentions. The same notation should be made, inserting the words "contended by plaintiff to establish infringement." I will also put in the word "alleged" after the word "some" on the second line. "Alleged [256] identities." Since these are admitted only as contentions. [257]

* * *

Cross-Examination

By Mr. Miketta: [258]

* * *

Q. Now, the various tear sheets, so-called, which exemplify the advertising put out by the plaintiff are in two volumes marked Exhibits 7 and 8, are they not? A. Yes.

Q. Is it not a fact that a great deal of the advertising matter which has been prepared by you and your agencies was directed to the functional and engineering aspects of the fixture?

(Testimony of Louis J. Rozier.)

* * *

The Witness: Part of the—I believe you are speaking [259] here of the “functionally designed” and “optically engineered”?

Q. (By Mr. Miketta): That is right.

A. That is partially the advertising agency’s poetic license, or whatever you may call it.

* * *

Q. (By Mr. Miketta): What is the representation in red, which appears on the tear sheet dated June, 1946, “Electrical Wholesaling”? Do you know?

A. It is a design based on a typical distribution curve.

Q. One of the E.T.L. distribution curves; is that correct?

A. I can’t say whether it is based on an E.T.L. curve. It is just a distribution curve.

Q. A light curve?

A. A light curve; yes, sir.

Q. And that is really directed to engineers, building superintendents, purchasing agents of the State or County, is it not?

A. Hardly, in “Electrical Wholesaling.” [260]

Q. The wholesalers furnish devices, in turn, to these various architects, do they not?

A. The wholesalers do, but this is directed to the electrical wholesalers.

Q. Is that the only time that type of ad has appeared?

(Testimony of Louis J. Rozier.)

A. No, it has run in other publications.

Q. It ran in "Architectural Record" probably, and in various other magazines, did it not?

A. Probably.

Q. Now, do you find anything in that advertisement which uses the words "aesthetic, beauty, ornamentation," or any such words?

The Court: Referring to?

Mr. Miketta: Still referring to this——

The Court: To the June, 1946, "Electrical Wholesaling" tear sheet?

The Witness: I find "Better taste" here, "pleasing designs," "compliment the architectural treatment of any installation requirement."

Q. (By Mr. Miketta): What else?

A. Along that line?

Q. Yes.

A. Nothing else in this particular ad.

Q. All right. Now, I call your attention to an ad appearing in Exhibit 8, apparently from "Electrical [261] Construction and Maintenance" of September, 1947. Is it not true that this ad is particularly directed to emphasis on the snap-on enclosure arrangement, whereby you can drop the entire housing and its connected louvers from the chassis and tubes? A. That is correct.

Q. Of course, that type of advertising has been placed by you in many publications, has it not?

A. That is correct.

Q. As evidenced by another clipping from the August, 1947, issue of what?

A. That is an engraver's proof. It is not an

(Testimony of Louis J. Rozier.)

actual tear sheet. Sometimes these are engraver's proofs. That was an August, 1947, ad that ran in some of the publications.

Q. Probably in more than one?

A. It probably did, yes, sir.

Q. I call your attention to the ad on the opposite page, also dated August, 1947, which apparently appeared in some publications,—

A. Right.

Q. —is that correct?

A. That is correct.

Q. And that calls attention to what? What is that element?

A. That is the spring clip that supports the enclosure on the chassis. [262]

Q. And permits the removal or the dropping of the chassis in this manner?

A. That is correct.

Q. —which is indicated on the opposite page?

A. That is correct.

Q. That particular function or that particular arrangement, mechanical arrangement, cannot be found in the defendant's structure, can it?

A. No.

Q. Approximately what percentage of your advertising expenditures were directed to those engineering and functional details and structural details, and what percentage of your advertising was directed to the aesthetics and the appearance? Can you make an estimate?

A. I can't even make a rough guess, no, sir.

(Testimony of Louis J. Rozier.)

* * *

Redirect Examination

By Mr. Foster:

Q. Were there any ads of the Viz-Aid fixture, Plaintiff's Exhibit 13, published in magazines, to your knowledge, which didn't contain an illustration showing the appearance of that fixture, and which contained only engineering or [263] technical information about it? Was there any such ad published?

A. You mean, was there any such ad on the Viz-Aid without an illustration of at least one fixture?

Q. Yes. A. No, there never was.

Mr. Foster: That is all.

* * *

The Court: We haven't seen this light on, have we,—the defendant's light?

Mr. Foster: I don't believe we have, your Honor.

(The light referred to was turned on and lighted.)

* * *

Mr. Miketta: While your Honor is observing the fixture, which is the defendant's fixture, I wish to call attention to the fact that the ends are perforated and light shines there through.

The Court: It differs, so far as the perforation is concerned, in that on the plaintiff's device there is some kind of a glass? [264]

Mr. Miketta: There is an opaque member.

The Court: It is opaque throughout, while in the defendant's fixture there is nothing except a space.

Mr. Miketta: Yes, your Honor.

The Court: What are those,—40-watt?

Mr. Foster: 40-watt, yes, sir. [265]

* * *

The Court: You are offering the stipulation and the notice attached thereto?

Mr. Foster: Yes.

The Court: It is in the file. It will be received in evidence as Plaintiff's Exhibit 17. [268]

* * *

ALBERT JASSIM

called as a witness by and on behalf of the plaintiff, under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Foster:

Q. Will you state your full name, please?

A. Albert Jassim.

Q. Your residence, please?

A. 730 North Kilkea.

Q. And your age? A. 36.

Q. You are the same Mr. Jassim who gave your deposition in this action in my office in Los Angeles on May 23, 1949, and you have read the reporter's transcript of that deposition and found

(Testimony of Albert Jassim.)

it all true and signed it under oath, haven't you, Mr. Jassim? A. Yes. [270]

* * *

The Court: You are calling this witness under 43(b)?

Mr. Foster: Yes, your Honor, under 43(b), and I will lay the foundation for that next.

Q. Mr. Jassim, I understand that you are now secretary of the defendant corporation and have been so since about May, 1947, is that correct?

A. Secretary and assistant treasurer.

Q. And a member of the board of directors?

A. Yes, sir.

Q. And that you have been employed by the defendant corporation since May, 1947, full time in the activities of the company, is that correct?

A. Yes, sir.

The Court: '47?

Mr. Foster: Yes, sir.

Q. And that your work for the company is now and has continuously been, since your first employment by the defendant, in connection with the purchasing and the financial side, keeping of books, and the operation of the office, is that true?

A. Yes. Since then I have been a little more on the outside. [271]

* * *

Q. Since you gave your deposition in the action in May of 1949 you have worked more outside?

A. Yes.

(Testimony of Albert Jassim.)

Q. Has that outside work been selling the lighting fixtures? A. Yes, sir.

Q. Such as Exhibits 14 and 15, the Paramount lighting fixture of the defendant corporation?

A. Lighting fixtures. I have been selling lighting fixtures, more on the selling end.

* * *

Q. (By Mr. Foster): I direct your attention to a catalog which was marked in your deposition Exhibit 5, for identification, bearing on its cover the title "Lighting by Ruby," [272] and particularly I direct your attention to pages 8 and 9 thereof.

* * *

Q. (By Mr. Foster): The catalog has been re-numbered for these proceedings as Plaintiff's Exhibit No. 18 for identification. I direct your attention to that exhibit and particularly pages 8 and 9 thereof and ask you when you first saw that catalog and those pages.

A. Well, my recollection would be when I first came with the firm.

Q. That is in May, 1947, you first saw that exhibit? A. Somewhere about that time.

Q. And that catalog was by the defendant corporation mailed out, was it not, to prospective customers to the extent of about 1,000, is that correct? A. Yes, sir, I would say so. [273]

Q. And that mailing was about May, 1947?

A. Yes, sir, somewheres there.

(Testimony of Albert Jassim.)

Q. And it was mailed to all of the prospective customers then had upon the mailing list of the defendant corporation?

A. Well, not all. There are times when we get new accounts and drop others, but I would say most of the people that we had on our books.

Q. Were any of the fixtures, such as illustrated upon pages 8 and 9 of Plaintiff's Exhibit 18, for identification, sold in May, 1947, by the defendant corporation?

A. They were sold in 1947. I wouldn't quite answer that they were sold in May. But they were sold during the year of 1947.

* * *

Q. (By Mr. Foster): There has been marked a catalog sheet by the clerk as Plaintiff's Exhibit 19 for identification, being the same sheet which was in the deposition Exhibit 4. I direct your attention to the sheet Plaintiff's Exhibit 19, for identification, entitled "The Paramount." Do you recall that you saw that sheet when you went to work for the defendant corporation in May, 1947?

A. I must have seen it, but I am not too well acquainted. [274] My recollection would be that this is the unit that was sold (indicating).

Q. By "this" you mean Exhibit 18, for identification? A. That's right.

Q. But you do recall that you did see the sheet 19 for identification in the offices of the defendant corporation?

(Testimony of Albert Jassim.)

A. Yes, sir, I must have seen it. I don't quite recollect that.

Q. Were those sheets, 19 for identification, by the defendant corporation mailed out or distributed at any time since you have been with the company?

A. Well, I don't recall any sheets being mailed as single sheets, but I do recollect the catalog being mailed. [275]

* * *

Mr. Foster: The catalog Exhibit 18, I offer the entire catalog as Plaintiff's Exhibit 18.

The Court: It will be received in evidence as Plaintiff's Exhibit 18.

Mr. Foster: And the single sheet marked 19 for identification is offered in evidence as Plaintiff's Exhibit 19.

The Court: It will be received in evidence.

* * *

Q. I show you a catalog marked Plaintiff's Exhibit 20 for identification and call your attention particularly to pages 5 and 6.

The Court: Is this another catalog?

Mr. Foster: Yes, your Honor.

Q. And particularly the two sides on page 5. Do you recall that that catalog containing that page was by the plaintiff corporation distributed in 1949? [276]

A. Yes, sir.

Q. About what month? A. I don't know.

Q. About the middle of the year?

A. Somewhere around there.

(Testimony of Albert Jassim.)

Q. And it was also distributed to about a thousand prospective purchasers of the defendant corporation?

* * *

A. The catalogs were distributed in thousands, but the prospective purchasers are not in the thousands.

Q. And fixtures, Paramount fixtures, of the defendant corporation, as illustrated and identified in Plaintiff's Exhibit 19 and Plaintiff's Exhibit 20, for identification, were sold by the defendant corporation, were they not?

A. Yes, sir, they were.

Q. And when did those sales commence to the best of your knowledge? [277]

A. Well, during the year '47 I would say they commenced.

Q. Probably in May or June of 1947?

A. I would say the year. I wouldn't know just what month we started to sell these fixtures.

Q. And those sales of that fixture continued by the defendant corporation from May or June, 1947, until the present? A. Yes, sir.

Q. And those sales have been made in Southern California, have they not, and in Los Angeles County? A. Yes, sir.

Q. And it is a fact, is it not, that up to May of 1949, at least, the far greater percentage of the sales of that fixture were made in California than in the rest of the country? A. Yes, sir.

Q. And your estimate is that up to at least May

(Testimony of Albert Jassim.)

of 1949 about 90 per cent of the sales of the fixture were made in California by the defendant corporation? A. Yes, sir, I would say that.

Q. Wouldn't you also say, Mr. Jassim, that through all the period of time during which the defendant has sold this Paramount fixture illustrated in Plaintiff's Exhibits 19 and 20 for identification, 90 per cent of its total sales have [278] been in California? A. Yes, sir.

Mr. Foster: The catalog marked Plaintiff's Exhibit 20, for identification, is offered into evidence as Plaintiff's Exhibit 20.

The Court: It may be received in evidence. [279]

* * *

Q. (By Mr. Foster): These exhibits, Plaintiff's Exhibits 18, 19 and 20, Mr. Jassim, I note contain not only information as to the size or dimensions of the fixture, but a pictorial representation of it showing the underside, the lateral sides, and the end of the fixture? A. Yes, sir.

Q. Now, why is it, if you know, that these catalogs of the defendant corporation contain such a pictorial representation of the fixture?

A. Well, that's for the engineers. Everything on that page is—would be pertaining to engineering. In other words, you have to show a picture for a man to see the shape. There is different shapes of fixtures, but then as you get down to the information, there is everything pertaining to the engineering right here (indicating). That is all en-

(Testimony of Albert Jassim.)

gineering data. The shape and the size are all engineering data. That has to be fitted into spaces, and with reference to the ceiling; like curves, efficiency,—that is all pertaining to engineering.

Q. Mr. Jassim, the record doesn't show what you mean when you say "this" and "that." You are pointing to the line drawings which appear upon page 5, and the curves which appear upon page 6 of Plaintiff's Exhibit 20, as indicating the information that must be shown; that is correct, isn't it? [280]

A. That is correct.

Q. Now, my question is directed to the pictorial representation which is at the top of page 5 of Plaintiff's Exhibit 20, which has no dimensions upon it, or angles, or indications of the lighting efficiency. Why is that inserted, if you know, in this catalog, Plaintiff's Exhibit 20? Why isn't there used in the catalog only this engineering information, which you identify?

* * *

The Witness: Well, we start everything with a picture. In other words, we start everything with a certain form. A man has to know whatever to show a man. He has to know what it looks like basically. Then we go along and give the man—in other words, we do everything. We sell fixtures to the wholesale jobbers, but we promote our fixtures through the engineers and architects.

Naturally, he has to see what the fixture looks like, to have an idea, but from there, of course, you

(Testimony of Albert Jassim.)

go right to the engineering data. In other words, it is unusual for him not to refer to the fixture with the engineering data. He has to have that, and he has to have an idea also what the fixture looks like. You can't just sell him engineering data, without an idea what the fixture itself looks like. [281]

Q. (By Mr. Foster): Well, as I understand your testimony, then, these catalogs, Exhibits 18, 19 and 20, contain a pictorial illustration of the Paramount lighting fixture because the company has found it is necessary for the purchasers to see what the fixture looks like, its over-all appearance, before they buy it, as well as to know the dimensions and the technical information about it; that is a fair statement? A. Yes, sir; that's right.

Q. And I judge from that that you and the defendant have found it is necessary, in order to induce others to purchase the fixtures of the defendant, that the purchaser should conclude that the fixture has a desirable, pleasing appearance, as well as meeting technical qualifications; that is a fair statement, isn't it? A. Yes.

Q. I notice throughout all of this catalog, Exhibit 20, that there are a number of illustrations of other fixtures, lighting fixtures, using fluorescent tubes, from which I think it is a fair conclusion that the defendant corporation has found it necessary to let prospective purchasers see the different fixtures of its manufacture not only have pleasing appearances, appealing to the eye, but they have different appearances so that the purchasers can

(Testimony of Albert Jassim.)

select those fixtures having a pleasing appearance that is [282] particularly appealing to them; is that a fair statement?

A. Well, I will say it. Basically, we manufacture a fixture from the study of light. We approach a fixture from the amount of efficiency of light, or spread, or upper or down light that we get out of it. It assumes shape as our engineering division shows us that it will do so-and-so, and so-and-so. Now, when it gets to that part of it, you sort of hold yourself down to certain dimensions, to get a certain amount of light out of it. Then it starts to take shape. Naturally, you could say if it is not pleasing it is not merchantable, and you certainly have to have it pleasing.

Q. In order to sell a lamp?

A. Well, sure. It has to have the efficiency of light. That's the basic point. That's the important point.

Q. I note in looking through this Plaintiff's Exhibit 20 that some of the fluorescent light tube fixtures, for example, back of page 2, have a length of $48\frac{1}{8}$ inches, and some of them, for example, a picture on the back of page 6, has the length of $49\frac{1}{2}$ inches, and some of them have a width of 14 inches, that is the back of page 6, and some of them have a height of 7 inches, the same page, whereas the Paramount fixture on the back of page 5 has a height of $61\frac{1}{4}$ inches, and a width of $12\frac{3}{4}$ inches. Those height and width dimensions are chosen in accordance with the selection of a design which is

(Testimony of Albert Jassim.)

sought to be appealing to the [283] eye; is that correct?

A. No. We select fixtures for the efficiency of light. In other words, we can't make the same type of fixture for every room, so we engineer fixtures to—in other words, if you go in a super-market you make one type of fixture, because you want a certain spread of light in the super-market. If you go to an office, you make another type fixture to give it a different type of efficiency. And these fixtures assume different shapes for the reasons of the different type of installations that you make. [284]

* * *

Q. Directing your attention to page 5, the fixture there, that is made in a form where it has only two light tubes, hasn't it? A. Yes, sir.

Q. On the same level horizontally? Side by side, they are horizontally on the same level?

A. Yes, sir.

Q. I notice it has a width of $12\frac{3}{4}$ inches and a height of $6\frac{1}{4}$ inches, as compared with this other one you have referred to, which has a height of 5 inches and a width of $12\frac{1}{2}$ inches. Where is that fixture on page 5 used?

A. This fixture here (indicating)?

Q. Yes.

A. Well, it would be used in drafting rooms, in certain offices.

Q. Well, do you recall any lamp fixture which is sold by the defendant corporation and advertised

(Testimony of Albert Jassim.)

in any catalog sheets distributed by the defendant corporation, which catalog [285] sheets do not contain a pictorial representation showing the appearance of that lighting fixture?

A. Well, I don't know of any advertising that doesn't show any pictorial. There are some. I have seen some, but mostly they would show that.

Q. Almost without exception all literature distributed by the defendant corporation with respect to its lighting fixture contains a large pictorial representation, so that the reader can see what the lighting fixture looks like, in order for him to determine whether it is appealing to his eye; that is true, isn't it?

A. Yes, sir; it is. [286]

* * *

Q. Is it your opinion that the Paramount fixture illustrated in Plaintiff's Exhibits 18, 19 and 20 differs in its over-all appearance from the other fixtures shown in the defendant's catalogs, Exhibits 19 and 20?

A. Well, all fixtures are different.

* * *

Q. Is it your opinion that the over-all appearance of the Paramount fixture illustrated in the Exhibits 18, 19 and 20 differs from the over-all appearance of the other fixtures of Defendant's manufacture illustrated in those catalogs?

A. Yes, sir, it does.

Q. Now, having regard to the over-all appearance of the Paramount fixture, which is in evidence

(Testimony of Albert Jassim.)

here as Plaintiff's Exhibits 14 and 15, what is there to your mind that distinguishes that appearance from the over-all appearance of the other fixtures of the defendant's manufacture, and will you state that, without studying any of the fixtures that are here in court, looking at the judge or myself?

A. Well, I would say the shape was a little different. It has a little different type of baffle on it.

Q. Do I understand that the over-all outline, for example of a section across the fixture, and the arrangement of the transverse and longitudinal louvers, to your mind, contribute to the over-all appearance of the Paramount fixture, which distinguishes it from the over-all appearance of the other fixtures of the defendant's manufacture; is that a fair statement?

A. The full shape is different than the other fixtures. If you refer to any particular feature itself, there are fixtures in our line that have the same features as the Paramount. [290]

Q. But to your mind, as I understand your previous answer, it is the shape, for example, of the ends of the fixture and the arrangement of the longitudinal and transverse baffles that enables you to distinguish the over-all appearance best of the Paramount fixture from the others of defendant, that is true, isn't it?

A. I wouldn't answer that. I would answer it in the respect that it has a little bit different shape than the other fixtures. But when you talk about

(Testimony of Albert Jassim.)

the louver, we apply that same idea to other fixtures.

Q. What did you mean when you said one of the two things to your mind that made the Paramount fixture appearance distinctive was the louvers? A. The shape of it.

Q. The shape of the louvers?

A. The shape of the fixture itself.

Q. You mentioned louvers. What is there about the louvers of the Paramount fixture that make it distinctive from other fluorescent lighting tube fixtures?

A. We have different types of louvers with different spacings.

Q. That is the spacing and the number of the louvers, transverse louvers, and the shape of the longitudinal louver, that is what you meant?

A. Yes. [291]

Q. What is there other than those features of the louvers that make the appearance of the Paramount fixture distinctive in your opinion from all other fixtures of the defendant, the over-all shape you have mentioned? Is there anything else?

A. It is very hard to answer that because there are a lot of fixtures that are very similar to the Paramount fixture.

* * *

Q. Haven't we agreed, Mr. Jassim, that in your opinion the appearance of the Paramount fixture of defendant is distinctive from the over-all ap-

(Testimony of Albert Jassim.)

pearance of all other fixtures of defendant? We agree to that, don't we?

A. I made a mistake if I said that.

Q. Don't you think so?

A. There are some features that it isn't too distinctive from. [292]

* * *

Q. Plaintiff's Exhibit 13 is the Viz-Aid fixture of the plaintiff corporation. You have seen that in court here while you have been in attendance, haven't you? A. Yes, sir.

Q. And you saw a Viz-Aid fixture like that prior to the time that you went to work for the defendant corporation, didn't you?

A. I don't think so. I don't really know. [295]

* * *

Q. Did you have anything to do, Mr. Jassim, with the design of the defendant's lighting fixture, Plaintiff's Exhibit 14 or 15, the Paramount fixture?

A. No, sir, I don't think I did. I don't think I was with the firm then. [296]

* * *

Q. But as regards the over-all general appearance to [298] your eye, at least, there is no difference in the appearance of the fixture illustrated in the sheet, which is Plaintiff's Exhibit 19, and page 5 of Plaintiff's Exhibit 20, when I place them side by side in front of you, that is true, isn't it?

A. Just at a fast glance, I would say so.

* * *

(Testimony of Albert Jassim.)

Cross-Examination

By Mr. Miketta:

Q. While you have Exhibit 20 before you, I want to call your attention to the fixture illustrated on page 3 of Exhibit 20. Is it correct that the width of that is $10\frac{3}{4}$ inches and the over-all height is $6\frac{3}{4}$ inches?

A. Yes, sir, according to the catalog.

Q. And that also has inclined sides and a step-down end and a louvered bottom, is that correct?

A. Yes, sir.

Q. And the ends are perforated with a certain design, [299] which is illustrated both in the perspective view at the top and also in the diagrams appearing in the center of the page, is that correct?

A. Yes, sir.

Q. And speaking of dimensions, turn to page 11, please. Now, the over-all height of that fixture is 5 inches and the width is $12\frac{1}{2}$ inches, is that correct? A. Yes.

Q. And I believe you had some difficulty in answering Mr. Foster's question as to whether that was used in a market or not. Will you read what appears in the upper left-hand portion of that page?

A. "The rich looking unit for banks, stores, civic buildings with high ceilings."

Q. In other words, as you glance through this catalog you find that there are various fixtures which are illustrated there, and they range in width

(Testimony of Albert Jassim.)

from approximately $10\frac{3}{4}$ inches to perhaps 15 or 18 inches, is that correct? A. Yes, sir, it is.

Q. And they vary in height of the total fixture from 5 inches as in the case of the fixture on page 11 to perhaps 7 or 8 inches, I believe 8 inches was the maximum commented upon, is that correct?

A. Yes, sir.

Q. Now, I call your attention specifically to Exhibit [300] 19, which is that single sheet. Look at that closely instead of casually and tell me whether that particular fixture as illustrated on sheet 19 was ever sold by Ruby Lighting, to your knowledge.

A. No, sir, it never has been.

Q. Why do you say that?

A. I don't ever recollect the design of this center part ever being sold, and I can't understand how it ever got in the catalog, frankly.

Q. In other words, in Exhibit 18 the fixture shown on page 8 differs from that shown on Exhibit 19 in the formation of that medallion or part on the side rails, is that correct? A. Yes, sir.

Q. But with that exception the rest of the unit is exactly the same, is that correct?

A. Yes, sir, it is.

Q. How are the louvers removed when you want to put the new lamps in?

A. You slide them out of the end, there is an opening in the end, and you slide it right out and it hinges off the other side.

Q. Can you point to a diagram that illustrates that? A. Yes, sir. Right here (indicating).

(Testimony of Albert Jassin.)

The Court: Referring to Plaintiff's Exhibit 19.

Q. (By Mr. Miketta): In other words, the entire louver assembly—you wouldn't call that sliding, it hinges, doesn't it?

A. Hinges, that's right.

Q. If you will refer to Exhibit 20 and look at page 3, do the louvers in that particular fixture hinge downwardly, too? A. Yes, sir.

Q. And the fixture illustrated on page 5, which is the accused structure, does that again show the louvers hinging down? A. Yes, sir.

Q. When those louvers are hinged down, you don't move the end plates down?

A. No, sir. The end place is stationary. [302]

* * *

Redirect Examination

By Mr. Foster:

Q. The catalog, Plaintiff's Exhibit 20, was by the defendant sent out or distributed to a certain mailing list or group of people, and the catalog containing the sheet Plaintiff's Exhibit 19 was likewise distributed and sent out to the same group of people, wasn't it?

A. Yes, sir, I would say so.

The Court: Now, just a minute. Has there been any testimony that Plaintiff's 19 was ever in a catalog?

Mr. Foster: I understood that it was.

Is that correct, Mr. Jassin?

(Testimony of Albert Jassim.)

The Witness: I think I made the statement that I have never seen it in a catalog.

Q. (By Mr. Foster): But you do recall that the sheet, Plaintiff's Exhibit 19, was distributed by the defendant corporation?

A. I assume I saw it. I don't remember that I did see it, but I will assume that. Being in the business, I know we made the sheet, so I assume that I saw it. [303]

* * *

Q. That was Plaintiff's Exhibit 4, for identification, as you will see here in the deposition on page 16, and here is the marking "Plaintiff's Exhibit 4, for identification," from the deposition, it is the same sheet as Plaintiff's Exhibit 19; isn't it your recollection of the testimony now that some of this sheet, Plaintiff's Exhibit 19, were distributed by the defendant corporation?

A. Well, maybe I didn't notice the design effect; but as far as I know, as long as the design has been called to my attention, I would say the only one that I recollect is the one that is in the catalog. [305]

* * *

Q. (By Mr. Foster): Did the defendant corporation ever notify the trade that a change had been made in the design of the fixture, Plaintiff's Exhibit 19, as regards the panels in the center of the sides and as compared with Plaintiff's Exhibits 18 and 20?

A. My first recollection of the fixture is just

(Testimony of Albert Jassim.)

exactly the way it is in the catalog. I didn't have anything to do with that sheet, and I may have seen it in our office. But the only recollection I have of the catalog being sent to any of our customers is the way it appears in the catalog as a total.

The Court: Do you know or do you not know whether or not any notice was sent out to the trade or your customers in which any specific reference was made to that sheet which is [308] Plaintiff's Exhibit 19?

The Witness: No, sir, I don't.

* * *

BENJAMIN RUBY

called as a witness by and on behalf of the plaintiff, under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Foster:

Q. Is your name Mr. Ruby or Rubinstein?

A. Ruby.

Q. Your full name?

A. Benjamin Ruby.

Q. You are a resident of Los Angeles County and you are president of the defendant corporation, is that correct?

A. That is correct.

Q. Do you recall that you gave your testimony by deposition in this action in my office on the 24th

(Testimony of Benjamin Ruby.)

of May, 1949, and read and signed your deposition there taken? [309] A. That is right.

Q. And you own some 79 or 80 per cent of the stock of the defendant corporation and have continuously since it was formed, have you not?

A. Correct.

Q. When did you first become associated with the defendant corporation, Mr. Ruby?

A. With the Ruby Lighting Corporation?

Q. Yes. A. Since the beginning of it.

Q. And that was when?

A. Shall we go back East or in California?

Q. Just this present company.

A. The present company I think was about 1940.

Q. And the Ruby Lamp Manufacturing Company, that was a predecessor, wasn't it?

A. That's right.

Q. With which you were associated in the East?

A. That's right.

Q. And it also dealt in lighting fixtures?

A. Correct.

Q. And after that and before association with the defendant corporation, you were an officer of Ruby Lighting Company, Inc., that is true, isn't it?

A. Correct. [310]

Q. And it also dealt in lighting fixtures?

A. That is right.

Q. And it was adjudged a bankrupt in 1942 and the present defendant corporation took over its assets, is that correct? A. That is correct.

(Testimony of Benjamin Ruby.)

Q. You have been continuously in attendance here in court during this trial, have you not?

* * *

A. I said I was absent one morning.

Q. Plaintiff's Exhibit 19 is one sheet of a catalog entitled "The Paramount." Was that sheet contained in a catalog distributed by the defendant corporation?

A. Just the sheets were distributed.

Q. And it was distributed to about a thousand people, was it not? A. Approximately.

Q. That was in 1947? A. About that.

Q. In approximately what month?

A. The early part of '47.

Q. Who made the design of the fixture which is shown [311] in Plaintiff's Exhibit 19? You made it, did you not?

A. I am not a designer, but it was made under my instructions.

Q. Well, weren't you and you alone responsible for the design of the fixture shown in Plaintiff's Exhibit 19? A. That is correct. [312]

Q. And helping you in that work was an employee of the defendant corporation known as Bob, was there? A. That's right.

Q. He was the only one who helped you, and he helped you by making sketches that you told him to make? A. That's right.

Q. And you don't know the last name of Bob, or where he is?

(Testimony of Benjamin Ruby.)

A. I don't know where he is now.

Q. And you don't know his last name?

A. I can look it up, if it is necessary.

Q. But you don't know it now?

A. I don't remember it. It is a hard name to remember.

Q. And the making of that design——

A. Yes.

Q. ——shown in Plaintiff's Exhibit 19, with the help of Bob, consumed somewhere between a total of 8 to 12 hours, did it not?

A. I don't know the hours because we made about, oh, I would say approximately 8 or 10 different designs.

Q. Just rough sketches which you threw away?

A. That's right.

Q. Isn't it your best estimate it was a few hours and probably less than 10 or 12 that were consumed in reaching the design shown in that exhibit, Plaintiff's Exhibit 19? [313]

A. Yes; a rough design, yes.

Q. And it was your purpose in making that design to provide a general over-all appearance and eye appeal for a fluorescent tube fixture that was distinctly different from the fixtures and their appearance as those fixtures were made by competitors; is that correct?

A. Well, no. The trend of business has been going towards engineered lighting for some time, see, and we had to revamp our line, and we have made about 8 or 10 designs on which 2 or 3 were left to

(Testimony of Benjamin Ruby.)

market, that we did put on the market at the same time, including this one.

Q. But when did you make this design on Plaintiff's Exhibit 19?

A. I would say late 1946 or '47.

Q. When you made that design, the defendant corporation didn't even have an engineer in its employ, did it, Mr. Ruby?

A. No. But our salesmen would come in and say they have got to have engineered lighting, and that's when we started to develop this line.

Q. Are you responsible for the engineering involved in this design, shown in Plaintiff's Exhibit 19?

A. No, sir.

Q. Well, you said there was no one other than Bob who helped you in the design? [314]

A. Yes, sir.

Q. And the company had no engineers in its employ?

A. No.

Q. Was any engineering done upon this design of the Paramount fixture, Plaintiff's Exhibit 19,—

A. No.

Q. —before this?

A. We have tried to make the fixture and placed the lamp in certain positions, and we put a light meter under it, to see what directions, and so forth, by ourselves. We didn't call it engineering, but it was close to it.

Q. You did that before this particular Plaintiff's Exhibit 19 was distributed by the defendant?

A. That's right.

(Testimony of Benjamin Ruby.)

Q. And you did that testing with the light meter in 1947?

A. Yes. We used light meters as far back as '40.

Q. But you used a light meter on the particular fixture, Plaintiff's Exhibit 19,—

A. That's right.

Q. —in 1947? A. That's right.

Q. Before you distributed this sheet?

A. That's right.

Q. No other engineering was done upon this fixture,— [315] A. No.

Q. —shown in Plaintiff's Exhibit 19?

A. No, sir.

Q. And no fixtures precisely like that shown in Plaintiff's Exhibit 19 were ever sold by the defendant, that is, fixtures having a side panel as indicated by the pencil numeral 1 on its side in Plaintiff's Exhibit 19? A. I didn't get that.

Q. Did the defendant corporation ever make a light fixture like that shown in Plaintiff's Exhibit 19 and sell it?

A. Exactly designed like that?

Q. Yes. A. This exact one?

Q. Yes. A. No, sir.

Q. The defendant did make and sell a fixture in all respects like that shown in Plaintiff's Exhibit 19, except it was a slightly different form, as to the ornament in the middle of the side of the fixture, as indicated by the pencil numeral 1 on Plaintiff's Exhibit 19; that is correct, isn't it?

A. We made another fixture, yes.

(Testimony of Benjamin Ruby.)

Q. And it was identical, with that exception?

A. That's right. [316]

* * *

Q. (By Mr. Foster): The fixture identical except for that panel in the side is the fixture that is shown in Plaintiff's Exhibits 18 and 20, and that is what you were referring to?

A. That's correct.

Q. Referring to Plaintiff's Exhibit 19, this decoration, two rectangles in the middle of the side indicated by the numeral 1, was your thought, as well as all the rest of the design; that's true, isn't it?

A. Well, it just come out that way. While you are designing, you try to put in something, and when you go to manufacture, you change your design completely because you can find labor-saving. You see, I also supervise in the factory, and we have this——

Q. But the idea of having that decoration indicated by the numeral 1 on Plaintiff's Exhibit 19 was yours?

A. That's right.

Q. Had you, prior to the time you completed the design shown in Plaintiff's Exhibit 19, seen fixtures of the Day-Brite Company like Plaintiff's Exhibit 13 here in evidence?

A. Well, here, prior to——

Q. Yes, had you seen that light fixture before the time you completed the design shown in Plaintiff's Exhibit 19? [317]

(Testimony of Benjamin Ruby.)

A. I have seen lots of fixtures, but I didn't take particular notice of that. I would go into a place and see 50 or 100 fixtures hanging there.

Q. You don't deny, do you, that you did see the plaintiff's fixture, Plaintiff's Exhibit 13, before you completed the design of the fixture, Plaintiff's Exhibit 19?

A. I don't deny it, and I don't admit it, because I have seen lots of them.

Q. Now, did any other employee of the defendant, or anyone else, help you in completing the design of Plaintiff's Exhibit 19, except this man Bob?

A. Complete it in the design?

Q. In the design, yes.

A. Not that I can remember.

Q. What were Bob's duties there with the defendant corporation? Was he an artist?

A. I would call him a designer or draftsman.

Q. He was a draftsman, was he? A Yes.

Q. Did the defendant corporation receive any orders for lighting fixtures as a result of distributing its leaflet which is Plaintiff's Exhibit 19?

A. Which one?

Q. Plaintiff's Exhibit 19.

A. Is this 19 (indicating)? [318]

The Court: That is 19, yes.

The Witness: I don't recollect if we received orders, but we never made this fixture.

Q. (By Mr. Foster): Did you ever notify any of those to whom you distributed the leaflet, Plain-

(Testimony of Benjamin Ruby.)

tiff's Exhibit 19, that the defendant would not make and sell a fixture exactly as there illustrated?

A. No, we never did, but with a lot of our fixtures, we can just change a little gimmick on it and just ship it without notification.

Q. Because it is so nearly like it?

A. It just doesn't make any difference.

Q. The changes make so little difference in the over-all appearance that it isn't necessary to notify the recipient of the catalog or sheet?

A. It doesn't make any difference in the design.

Q. So that you felt here the appearance of the fixture in Plaintiff's Exhibit 19 and the appearance in Plaintiff's Exhibits 18 and 20 were so nearly alike, that the change in the panel numeral 1 in Plaintiff's Exhibit 19 was so insignificant that it wasn't necessary to notify the purchasers that you were changing it?

A. We didn't notify them.

Q. Is that right? A. That's right. [319]

The Court: In addition to Plaintiff's Exhibit 19 in evidence, that is that one sheet you have been looking at,—

The Witness: Yes.

The Court: —did this employee Bob, or you and Bob in conjunction, also prepare a blueprint or a specification of this fixture?

The Witness: No, we roughed it out, see.

The Court: Now, what did you rough out? Did you rough out the fixture shown on Exhibit 19 on a blueprint?

(Testimony of Benjamin Ruby.)

The Witness: No, we roughed this out on regular drawing paper.

The Court: Just as you have it there?

The Witness: Yes, on white drawing paper.

The Court: What I am asking you is: what you roughed out on white drawing paper was the fixture shown on Exhibit 19?

The Witness: That's right.

The Court: Or was it a plan with dimensions of the fixture?

The Witness: No, it was with dimensions, like a working drawing for the factory.

The Court: You made a working drawing?

The Witness: That's right.

The Court: In addition to Exhibit 19?

The Witness: That's right. [320]

The Court: And the working drawing had dimensions on it?

The Witness: Yes, sir.

The Court: The height, width, length?

The Witness: Yes, sir.

The Court: Do you still have that drawing?

The Witness: I don't think so. I have been looking through all the drawings, and this man hasn't been with us for some time, and I just couldn't find it.

The Court: You say you never made any of the fixtures shown on Exhibit 19?

The Witness: No.

The Court: But you made the fixtures called "Paramount" shown in Exhibit 18?

(Testimony of Benjamin Ruby.)

The Witness: That's right.

The Court: On pages 8 and 9?

The Witness: That's correct.

The Court: Did you have a blueprint, a working drawing for those?

The Witness: Well, this is after three years. It is very hard to clean the room out, and you change employees.

The Court: Aren't you still making the Paramount design shown on pages 8 and 9 of Exhibit 18?

The Witness: We still make—we haven't made that, I would say, for four, five or six months. [321]

The Court: You made some as late as six months ago, then?

The Witness: Yes.

The Court: Did you have a blueprint or design?

The Witness: No, we have the patterns in the factory, see. We have a pattern like when you cut dresses, or anything else.

The Court: Jigs and patterns and what-not?

The Witness: Yes.

The Court: Do you still have the jigs and patterns?

The Witness: I think we should have it. It becomes a stock body. We use three or four different numbers on the same chassis, as you call it, on the body in there.

* * *

Q. (By Mr. Foster): Let me see if I understand you correctly, Mr. Ruby: After you had completed the design of the fixtures shown in Plaintiff's Ex-

(Testimony of Benjamin Ruby.)

hibit 19, one of them was made by hand by the defendant corporation?

A. That's correct. [322]

Q. Then you looked it over, and approved it, and had the commercial devices made like it, except that this panel indicated by the number 1 was changed?

A. I found labor-saving devices, and we had to change these while we made it.

Q. The labor-saving device has reference to this panel No. 1 on Plaintiff's Exhibit 19?

A. That's correct.

Q. How soon after you had completed the design of Plaintiff's Exhibit 19 did you have this one made in the shop? Was that right afterwards?

A. Oh, I would say several weeks.

Q. Then, as soon as the one was made in the shop,—about when was that made? In '47?

A. In '47.

Q. About May or—

A. The early part of '47.

Q. How soon after was it, after the first one was made in the shop in early '47, that the commercial forms were made and sold? Was it just a matter of a couple of weeks?

A. That's correct. We made dies.

Q. Would you say two or three weeks?

A. After the first one?

Q. Yes. A. A few weeks, yes. [323]

Q. Two or three weeks after the first one was made, your shop started turning out the commercial

(Testimony of Benjamin Ruby.)

product like Plaintiff's Exhibit 19, except for the panel there? A. That's right.

Q. And what were the steps you took in having this first device made? You just took the sketches that Bob made for you under your direction, showing this design on Plaintiff's Exhibit 19, to your shop and said, "Make one like this"?

A. That's right.

Q. And you told them what dimensions to use in making that one? It was a full-size fixture, wasn't it?

A. It was a full-sized drawing that goes according to dimensions and all. We made ours for the lamps, and we can't go over that, because then the lamps won't go in.

Q. But you selected the dimensions and told the shop?

A. The approximate dimensions that will fit into it.

Q. And those dimensions of the first one, made by the shop under your direction, were the same as the ones that were subsequently made commercially, except for this middle panel, No. 1, on Plaintiff's Exhibit 19? A. That's correct.

Q. But all that they had in the shop to make that first fixture, Paramount fixture, like Plaintiff's Exhibits 18 and 20, were these sketches that Bob made for you,— [324]

A. That's correct.

Q. —and the dimensions you gave them?

(Testimony of Benjamin Ruby.)

A. That's correct.

Q. Then when the fixture was produced commercially, like Plaintiff's Exhibits 18 and 20, all your shop had to go by was the fixture that was first made, incorporating your design that you have just referred to?

A. That's correct.

The Court: He told me that they made a blueprint to work from.

The Witness: A working drawing on a white paper.

The Court: A working drawing on a white paper.

The Witness: Yes, sir.

The Court: Rather than a sketch.

The Witness: That's right.

Q. (By Mr. Foster): When the first one was made incorporating this design, was there a drawing on white paper with all the dimensions?

A. Yes, a working drawing.

Q. Even before the first fixture was made?

A. Yes.

Q. Then the same working drawing with all dimensions was used in the shop to produce the commercial fixture like Plaintiff's Exhibits 18 and 20?

A. Yes, with a few minor changes, where you could save [325] on the labor, or something.

Q. And Bob worked out that drawing?

A. Yes, sir.

Q. And you gave him the dimensions to put on it?

A. That's correct.

Q. And that included the number of louvers, and the height and width of the fixture, and so on?

(Testimony of Benjamin Ruby.)

A. That's correct.

Q. Now, what made you select the values you did for the height and the width of that fixture? How did you get those dimensions?

A. Well, we go by the—by all lighting fixtures. They are all about the same height or width, within fractions different.

Q. Did you take the height and width and length dimensions involved in Plaintiff's fixtures 14 and 15 off of some other fixture?

The Court: Just a minute. You mean Plaintiff's Exhibits 14 and 15?

Mr. Foster: Yes, Plaintiff's Exhibits 14 and 15. I am sorry, your Honor.

The Witness: No, on all lighting fixtures we studied the height so as to have room enough for ballast and room enough for the lamps and room for a louver to swing. In 99 out of a hundred fixtures they are about the same height. [326] You have to have that amount of height to have the lamps and the ballast.

Q. (By Mr. Foster): How did you get the height of the fixtures, Plaintiff's Exhibits 14 and 15?

A. Just by drawing it up.

Q. And the length the same way?

A. Yes.

Q. How did you happen to fix on the No. 13 as the number of transverse louvers, instead of 10 or 18, or some other number?

A. Well, if you have them too wide apart, you would see the lamp, and if you close them too much,

(Testimony of Benjamin Ruby.)

you don't get the light through. You go according to what the fixture will demand for the light output and still be shielded.

Q. This drawing that was made before the first device was made there in your shop, that drawing had 13 transverse louvers in it, didn't it?

A. I think we had 15 in it.

Q. Then you changed it, after the first one was made, to 13, did you?

A. No, we never changed it.

Q. How many transverse louvers does the defendant's fixture have, Plaintiff's Exhibits 14 and 15?

A. 15. One at each end, and 13 through. The whole louvers consist of 15. [327]

Q. And the first drawing made by Bob for you with this design, before any fixture was made, had the same number of transverse louvers in it as the commercial form which is Exhibits 14 and 15?

A. That's correct.

Q. That drawing had that number of louvers because you told Bob to put them in there?

A. Not that I told him. When you have the same people, you figure just about what you must have.

Q. He didn't determine the number? You determined that, didn't you?

A. Well, we determined it by the amount that there must be on there. We may have started with less or more, but it won't lay out in the plans, see. You keep going until you know it is right.

(Testimony of Benjamin Ruby.)

Q. You say you were the one that was entirely responsible for this design. Did you select the number of transverse; louvers that are in your fixtures, Plaintiff's Exhibits 14 and 15?

A. Well, I could say yes.

Q. Did you try it out with any different number of transverse louvers?

A. No. When you put it on the paper, see, you can see right then and there you can't have six and you can't have sixteen. [328]

Q. You put 15 in there the first time, and you were satisfied, and you let the number remain?

A. That's right.

Q. And you chose 15 because you thought that was a good number?

A. No. When we put it up, we put it up to distribute the light good, because the distribution must be accurate.

Q. But you say on this drawing, which was made before any fixture was made, you put on 15 transverse louvers? You chose that number?

A. No. As we go along, we make the fixture and see how many. First we make the body, and the end casting, and we work it right into it.

Q. Now, the drawing you just made on white paper? A. Yes.

Q. And as I understood you, the drawing was made before any fixture was made at all?

A. Yes.

Q. And that had 15 transverse louvers on it?

A. It may have had 15.

(Testimony of Benjamin Ruby.)

Q. It had that because you selected that number rather than any different number? A. Yes.

Q. And your answer is that you just guessed 15 would be a good number rather than any other number; is that right? [329]

A. Yes, it would lay it out in a good proportion.

Q. You didn't try out on paper, or any other way, any different number of transverse louvers, did you? A. No.

Q. Now, no one has applied, no one connected with the defendant have any design patents upon this Paramount fixture, Plaintiff's Exhibits 14 and 15, have they? A. No, sir.

Q. And you haven't applied or caused to be applied for design patents on the fixture, because you believe that the design patents would not prevent anyone from making the same fixture; that is true, isn't it?

A. Yes, sir; from experience. I can explain why.

Q. You did not apply or have anyone apply for the design patents on the fixture, Plaintiff's Exhibits 14 and 15, because from your experience you believed anyone could make a little change in the design and get around the patent; that is right, isn't it? A. It has been done to me.

Q. Well, that is the reason you didn't apply; isn't that right. A. Yes.

* * *

Q. By Mr. Foster: You remember that you did receive [330] this notice of infringement, dated

(Testimony of Benjamin Ruby.)

August 12, 1947, on behalf of the plaintiff, which is Plaintiff's Exhibit 17, didn't you?

A. Yes, sir.

Q. Did you take any steps to diminish your sales or attempts to sell the Paramount fixture, Plaintiff's Exhibits 14 or 15, because of that notice of infringement?

* * *

The Witness: I took no steps at all. I couldn't recall my catalogs, or anything, and did nothing about it.

Q. (By Mr. Foster): Well, you continued with the same degree of effort to attempt to sell this Paramount fixture, Plaintiff's Exhibits 14 and 15, after you got the notice of infringement, as you did before, didn't you? A. Yes, sir.

Q. I direct your attention to Plaintiff's Exhibit 10, entitled "Prior Art Designs from Patents," and direct your attention to tabs numbered or letters B, and C, and AH. Would you look at B and C in there?

* * *

Q. You never saw that patent prior to the [331] time you designed the defendant's Paramount fixture, did you? A. This patent?

Q. Yes. A. I have never seen that before.

Q. And look at C of the same exhibit. Did you ever see that patent—— A. No, sir.

Q. ——before you made your design?

A. No, sir.

(Testimony of Benjamin Ruby.)

Q. Did you ever see a fixture having exactly the design of tab C before you made your design?

A. I have seen this before.

Q. Did you ever see a fixture having exactly the design of tab B before you?

A. Which is that?

Q. This one (indicating).

A. This one,—I have seen several shapes of fixtures like that.

Mr. Miketta: You have seen that?

The Witness: I have seen some shapes of fixtures like that when I was in New York.

Q. (By Mr. Foster): Have you seen a fixture having exactly the design of the patent tab B of Plaintiff's Exhibit 10? A. Which is B? [332]

Q. This (indicating). A. The patent?

Q. Have you seen a fixture having exactly that design? A. Close to it; very close to it.

Q. I direct your attention to tab AH, and ask you if you ever saw that patent before you made the design of the Paramount fixture, Plaintiff's Exhibits 14 and 15? A. This patent?

Q. Yes.

A. I have never seen that before.

Q. Have you ever seen, before you made your design, tab AM? Have you ever seen that patent?

A. No, sir.

Q. Did you see the patent AU before you made the design of the Paramount fixture?

A. No, sir.

(Testimony of Benjamin Ruby.)

Mr. Foster: The patents to which I have called attention in Plaintiff's Exhibit 10, your Honor, are the patents pleaded by the defendant as anticipating the patents in suit.

Q. (By Mr. Foster): Now, I direct your attention to the other book there before you, which is Plaintiff's Exhibit 9, and, particularly to the catalog which is tab B of that exhibit. Did you have those catalog sheets, tab B, before you, or use them in making the design on the Paramount [333] fixture?

* * *

A. No, sir, I have never seen them.

Q. —before making the design?

A. I have never seen them, no, sir.

Q. Then turn to tab C. Did you have before you that sheet?

A. I have never seen this before.

Q. And tab D, Illuminating Engineer. Did you ever see that before? A. No, sir.

Q. Tab E, another Illuminating Engineer page. Did you ever see that before? A. No, sir.

Q. Tab F, catalog of Guth Company.

A. Guth.

Q. Did you ever see that before?

A. No, I haven't seen this fixture.

Mr. Foster: Those are the catalog sheets in [334] Plaintiff's Exhibit 9, your Honor, which have been pleaded by the defendant as anticipating the design of the patent in suit.

(Testimony of Benjamin Ruby.)

The Court: Is it true, counsel, that knowledge doesn't make too much difference in these matters?

Mr. Foster: That is true, your Honor.

* * *

The Court: The statement I made should be, more accurately, if a design or patent is actually anticipated, it doesn't make any difference whether the party knew first-hand that it was so anticipated or not?

Mr. Foster: Yes, I agree with that, your Honor. I think that is the law. [335]

* * *

Q. (By Mr. Foster): When you were developing the design of the Paramount fixture, Plaintiff's Exhibits 14 and 15, did you utilize what was shown by any patents in that work? A. No, sir.

Q. Or any catalogs I have shown you?

A. No, sir.

Q. The defendant corporation sells its lighting fixtures to the same class of people to whom the plaintiff corporation sells its lighting fixtures, Plaintiff's Exhibit 13, that is true, isn't it?

A. Approximately the same.

* * *

The Court: Are you in competition? You have seen the [337] plaintiff's device, which is Exhibit 13, and you have seen your devices, which are Exhibits 14 and 15. Is your company in competition with the plaintiff in connection with the sale of those devices?

(Testimony of Benjamin Ruby.)

The Witness: Yes, sir, with an explanation.

The Court: What is your explanation?

The Witness: They have a certain clientele that won't buy my fixture, and I have a clientele that won't buy theirs. I can give you an example. They sell Graybar Company that fixture. I can't sell it to them. I may sell Westinghouse, and they won't buy theirs. But it is the same line of business.

Mr. Foster: Have you finished, your Honor?

The Court: Yes.

What is the relative price of these two fixtures, or is that material?

Q. (By Mr. Foster): For what price do you sell the two-lamp Paramount fixture and the four-lamp? A. For what price we sell it?

Q. Yes.

A. It is in my price list here. Have you got a price list?

Q. I show you Plaintiff's Exhibit 9. Is it in any of those catalogs?

(A document was handed to the witness.) [338]

The Court: Which is the two-lamp, Exhibit 14 or 15?

Mr. Foster: Plaintiff's Exhibit 14.

The Witness: \$33.80, less 50 and 10. \$33.88, less 50 and 10.

Q. (By Mr. Foster): Less 50 per cent and then less 10 per cent?

A. Yes, that's right. It is 50 and then less 10.

Q. Which Paramount fixture is that?

(Testimony of Benjamin Ruby.)

A. The two-light.

The Court: What is the 50 per cent discount? To whom?

The Witness: That is the jobber. He gets 50 and 10, and then the jobber resells it less 50 or 40 off, and they make the difference.

Q. (By Mr. Foster): Is the two-lamp a surface-attached lamp or a suspended lamp?

A. Everything on the price list is without hangers. Just surface mounted.

Q. And the four-lamp?

A. The price of the four-lamp is \$48.88.

The Court: That includes the fluorescent lamps?

The Witness: No. We don't sell lamps.

* * *

The Court: Is there a stipulation as to what [339] plaintiff sells No. 13 at?

Mr. Foster: May we have your indulgence here a moment, your Honor, and I will show it to Mr. Miketta?

Plaintiff's Exhibit 13, their fixture, the two-tube surface light has a list price of \$41.40, less 50 per cent and less 20 per cent, making a net of \$16.56, freight allowed.

The Court: That is surface attached?

Mr. Foster: Yes. That is to be compared with the defendant's net price of \$15.25.

The Court: The defendant's net?

Mr. Foster: Yes, \$15.25.

The Court: Is it stipulated that is what \$33.88 minus 50, minus 10, would figure out, \$15.25?

(Testimony of Benjamin Ruby.)

Mr. Miketta: So stipulated, your Honor.

Q. (By Mr. Foster): In general, as I understand it, Mr. Ruby, the defendant corporation competes with the plaintiff corporation in the sale of its Plaintiff's Exhibits 14 and 15, the Paramount fixture?

A. Yes, sir.

Mr. Miketta: May I interrupt for a second while we are talking about price, your Honor? Mr. Ruby's price is f.o.b. factory, whereas the plaintiff's price is on a freight-allowed basis.

Mr. Foster: That is correct. [340]

* * *

The Court: What do you mean by the plaintiff's price, "freight allowed"?

Mr. Miketta: I think the meaning of that is that the company, the plaintiff, pays the freight to its destination.

Mr. Foster: That is the effect of it. The customer pays the freight and we give him credit for the freight paid in billing him. We allow it. That is the reason for the word "allowed."

* * *

Cross-Examination

By Mr. Miketta:

Q. Mr. Ruby, when did you first start working on lighting fixtures?

A. Working in the industry, is that it?

Q. Yes. A. About 1915.

Q. You were quite a young man then, weren't you?

A. Fourteen years old. [341]

Q. When did you first engage in the business or

(Testimony of Benjamin Ruby.)

have your own business in which you were manufacturing lighting fixtures? A. In 1925.

Q. That was in New York? A. Yes.

Q. That was called the Ruby Lamp Manufacturing Company. A. That is correct.

* * *

Q. (By Mr. Miketta): I show you Defendant's Exhibit B for identification and ask you to tell us what that is.

A. That is the Ruby lighting catalog.

Q. For what year? A. 1939.

Q. Does this illustrate the various designs of lighting fixtures which your company was manufacturing in 1939? A. That is correct.

Q. Prior to 1939 what types of fixtures [342] were you manufacturing?

A. We manufactured incandescent and what they call lumiline.

Q. That meant a long incandescent bulb?

A. Long incandescent bulb.

Q. During the course of your work prior to 1940 or '42, had you personally engaged in, you may say, manufacturing activities like metal cutting and bending and welding in various plant operations?

A. Prior to 1925 I worked in a factory, in the industry.

Q. So you are familiar with production methods and how to handle tools? A. Yes, sir.

Q. During the course of those years from, say, 1925 to 1942, had you made yourself familiar with

(Testimony of Benjamin Ruby.)

the catalogs published by other manufacturers of lighting fixtures?

A. Well, we would get catalogs, and my associates used to take care of that end of it. I was the factory man at that time.

Q. But you have seen numerous catalogs?

A. Yes, surely.

Q. Have you ever done any sales work?

A. Partly, yes, sir.

Q. You are familiar with what the trade desires in the form of lighting fixtures, aren't you? [343]

A. Yes, sir.

Q. And you were familiar with the desires of the trade in, say, 1942, '43, '44? A. Yes, sir.

Q. And before you designed the defendant's fixtures? A. Yes, sir.

Q. That are in suit here? A. Yes, sir.

Q. In talking about Exhibit 19, which is that single sheet, you said something about a labor saving that you made in the factory.

A. That is correct.

Q. Will you please explain what you were talking about? What labor saving?

A. I have saved four spot-welds on each side of the fixture.

Q. By doing what?

A. By making that little oval design.

Q. In other words, by eliminating the three bars shown on Exhibit 19 and substituting in its stead the medallion which is shown on page 9 of Exhibit 18 you saved four spot-welding operations?

(Testimony of Benjamin Ruby.)

A. Yes. Eight for a complete fixture, both sides, four on each side.

Q. So that that medallion is now spot-welded only in [344] two places, to the top and the bottom rail on each side, is that correct?

A. That's correct, yes.

Q. As exemplified by Plaintiff's Exhibits 14 and 15 in the courtroom, is that correct?

A. That is correct. Are 14 and 15 my fixtures?

Q. Yes. A. That's right.

Q. That change that you made, then, was a change for purposes of economy, is that correct?

A. Correct.

Q. And it did not affect the light distribution, is that correct?

A. Not at all.

Q. Prior to 1946, did you supervise the activities of your salesmen?

A. I did.

Q. Do you receive bids from various governmental bureaus like the Division of Architecture of the Department of Public Works, and the Army and the Navy, and other people who are interested in building?

A. Yes, sir. [345]

* * *

Q. (By Mr. Miketta): Mr. Ruby, when we talk about specifications or requests for bids, in general, you are familiar with various specifications and requests?

A. Yes, sir.

Q. Is it customary in such specifications and bids, which you may have received at any time during the past ten years, to specify a particular design or ornamentation on a fixture?

(Testimony of Benjamin Ruby.)

A. No, sir.

Q. Is it customary in specifications for fluorescent lighting fixtures to specify the wattage of the fixtures?

A. Yes, sir.

Q. Is it customary that those specifications specify cut-off angles? [347]

A. Yes, sir.

Q. And characteristics of a ballast or reactor to be used?

A. Yes, sir.

Q. And do such specifications, in general, tell you whether they are going to be surface hung or provided with hangers?

A. Yes, sir.

Q. But they don't specify whether the fixture should have inclined sides or a flat bottom, or whether it should be of one design or another, do they?

A. No, sir.

Q. In general how do these specifications identify the fixture that the purchaser wants to buy?

A. Well, they will put in the specifications "Benjamin or equal," that is a make, "Miller Company or equal," "Day-Brite or equal," "Ruby or equal," but nothing about style, shape of fixture. They will tell you 30-degree or 40-degree, or so much up-light, so much down-light.

Q. And requirements of that type to which you have referred are illustrated in Defendant's Exhibit C, for identification?

A. Yes, sir. [348]

* * *

The Court: * * * Are you going to offer in evidence Exhibit B?

Mr. Miketta: Yes, I would like to have that in

(Testimony of Benjamin Ruby.)

evidence, your Honor. May I now offer it in evidence. [349]

* * *

The Court: It will be admitted into evidence as Defendant's Exhibit B.

* * *

Q. (By Mr. Miketta): Now, Mr. Ruby, you testified that you did not have before you at the time that you were working on the design, the defendant's Paramount fixture which is before this court as Plaintiff's Exhibits 14 and 15,—that you did not have before you at that time certain specific fixtures in Plaintiff's Exhibit 9 or certain prior patents shown in Plaintiff's Exhibit 10. Was that your testimony? A. That's right.

Q. But you did have a background of experience in which you had seen a good many of those fixtures, have you not? A. Yes, sir.

Q. Now, prior to the time that you and Bob worked on this design of the Paramount fixture, had you seen fixtures similar to those illustrated in Plaintiff's Exhibit 9, tab B? A. Yes, sir.

Q. And certain of those fixtures had step-down and perforated ends, did they not? [351]

A. Yes, sir.

Q. And most of them had inclined translucent sides; is that correct? A. Yes, sir.

Q. And some had louvers, and some didn't have louvers? A. Yes, sir.

Q. And in some the side panels were divided by some sort of a banding, and in others, they were not; is that correct? A. That's correct.

(Testimony of Benjamin Ruby.)

Q. You knew the trend in which the art, if you can call it an art, the desires of your purchasers were going; is that correct? A. Yes, sir.

Q. Did they want lighter-looking fixtures or heavier-looking fixtures? A. Lighter-looking.

Q. So in your design you tended to make your fixture as compact as possible; is that correct?

A. Correct.

Q. I understood you to say that you started business in Los Angeles about 1940 or '42?

A. '40, sir.

Q. In 1940?

A. Or in late '39, it may be; approximately. [352]

Q. At that time, Mr. Ruby, was there any other company engaged in the manufacture of fluorescent fixtures in the Los Angeles area?

A. Not that I know of.

Q. Since then are there other companies engaged in the manufacture of fluorescent fixtures?

A. Lots of them.

Q. Can you name some of them?

A. Well, the Sunbeam is a large company; they are former employees of mine. I can't name all of them. Let me see. The Sunbeam, and there is Lumidor, and Smoot-Holman makes lighting fixtures, fluorescent.

Q. Are they engaged in manufacturing fixtures that are similar to the Paramount fixture?

A. Yes, sir.

Q. You state that some of your employees are now associated with the Sunbeam?

(Testimony of Benjamin Ruby.)

A. Yes, that's the Sunbeam Company. I brought them here from New York.

Q. When did they leave you?

A. About two years later; I would say in '44.

The Clerk: I have marked three documents Defendant's Exhibits D, E and F, for identification.

The Court: D, E and F. [353]

* * *

Q. (By Mr. Miketta): I show you three catalogs marked Defendant's Exhibits D, E and F, for identification, and ask you to point out any fixtures illustrated therein which, to your mind, are rather similar to those which form the subject-matter of the action here.

A. There is one right there (indicating).

The Court: Just a moment. You are talking about Exhibit D, for identification?

Mr. Miketta: Yes, on Exhibit D.

The Court: All right.

Q. (By Mr. Miketta): And you are pointing to——

A. 1204; L 1204.

Q. A fixture known as L 1204?

A. Yes. That's better than mine.

Q. Now, you are referring to Exhibit E?

A. Let's see. There's one close to it. This one here (indicating).

Q. Now, you are pointing to page 8 of Exhibit E, an item in the upper left-hand side marked L 1210-SL series. Do you consider that lamp to be similar to the lamps——

(Testimony of Benjamin Ruby.)

A. Yes, sir.

Q. —forming the subject-matter of this action?

A. Yes, sir. There's another one (indicating). [354]

Q. Another one on page—what page is that?

A. Page 4.

Q. On page 4, the fourth lamp from the top of the page; is that correct? A. Yes, sir.

Mr. Foster: What number is that?

The Witness: That is L 1210.

Mr. Miketta: L 1210.

The Court: Let me see it before you lose it.

(The document was handed to the court.)

Mr. Foster: May I interrupt to ask: All of these catalogs, D, E, F, for identification, are subsequent to the patents in suit, are they?

Mr. Miketta: I have not looked at the dates.

Mr. Foster: They are not offered as prior art, though?

Mr. Miketta: May I check the dates on them?

Mr. Foster: The witness testified the Sunbeam did this.

The Witness: Two years later.

Mr. Foster: —after this, so they are not prior art at all, as I understand it?

The Witness: That is right.

Mr. Miketta: I think that is correct.

The Court: Defendant's E on the front page, the first insert page, states "Effective June 1, 1949." That is this schedule. [355]

(Testimony of Benjamin Ruby.)

Mr. Miketta: These exhibits, your Honor, are simply offered for the purpose of indicating what the trade, what the manufacturers are making, and what the public desires in the form of lighting fixtures.

Mr. Foster: But all subsequent to the date of the patents in suit?

Mr. Miketta: They are subsequent to the date of the patent in suit, as far as the specific items referred to by the witness, counsel.

The witness also has referred to Exhibit F, for identification, and particularly to page 5, which illustrate the 1210 series again, your Honor.

The Court: Are you offering these?

Mr. Miketta: Yes, your Honor. I am offering those in evidence for the purpose of indicating the character of fixtures that are being manufactured, and the similarity of those fixtures to prior art designs.

Mr. Foster: I think it is immaterial, your Honor, and, certainly, it is not prior art and is confusing in the record. It is objected to on that ground, all being subsequent to the date of the patents in suit.

Mr. Miketta: I admit that the publications are subsequent, but I think they can be tied in with Mr. Ruby's 1941 catalog, and the same representations which appear there also are to be found in Defendant's Exhibits now being [356] offered in evidence.

Mr. Foster; Is it the defendant's position that this 1210 design of Exhibit F is the same as the defendant's design? Is that it?

(Testimony of Benjamin Ruby.)

Mr. Miketta: Very similar, and similar to others in the 1941 catalog.

The Court: In view of the limited scope of the offer, there is no harm in admitting them. It is conceded it is not prior art?

Mr. Miketta: That is right, your Honor.

The Court: The objection will be overruled. They will be admitted into evidence as Exhibits D, E and F. [357]

* * *

Redirect Examination

(Resumed)

By Mr. Foster:

Q. Mr. Ruby, in the production of the Paramount fixture, Plaintiff's Exhibits 14 and 15, as compared with Paramount fixture shown in Plaintiff's Exhibit 19, you save four spot welds on each side of the fixture with regard to the decoration of the metal of each side, is that correct?

A. I said I saved four. It would be six, instead of two.

Q. Do I understand that in the production of the fixture of Plaintiff's Exhibit 19 there were six spot welds on each side?

A. There would be six, I said.

Q. And there are two on each side of the Plaintiff's Exhibits 15 and 14, is that correct?

A. That is correct.

Q. That decorative medallion in the middle of the side of the Paramount fixture, Plaintiff's Ex-

(Testimony of Benjamin Ruby.)

hibits 14 and 15, [259] is stamped out of one piece of metal, isn't it? A. That's right.

Q. And at the top of each and the bottom of each there are two spot welds to the side rail?

A. Correct.

Q. Couldn't the decorative medallion in the middle of each side of plaintiff's Exhibit 19 indicated by the pencil numeral 1 be stamped out of one piece?

A. Not all three of them.

Q. Why not? What is there that is an obstacle to making that a metal stamping just as it is a metal stamping in the middle of the side of Plaintiff's Exhibits 14 and 15?

* * *

The Witness: I didn't know how to make it all in one. [360]

Q. (By Mr. Foster): Have you had experience now with making fixtures that enables you to state whether or not the decorative medallion in the middle of the sides of the fixture, Plaintiff's Exhibit 19, could be stamped in one piece?

A. No, sir.

Q. Were you influenced, Mr. Ruby, in changing the design of the medallion in the middle of each side of the fixture, indicated by the pencil numeral 1 on Plaintiff's Exhibit 19, by a desire to get further away from the plaintiff's designed fixture,—

A. No, sir.

Q. —Plaintiff's Exhibit 13?

A. No, sir.

(Testimony of Benjamin Ruby.)

Q. Well, is it your testimony to the court that you had not seen the plaintiff's Viz-aid fixture, Plaintiff's Exhibit 13, when you made the change in design in—— A. I didn't——

Q. ——Plaintiff's Exhibit 19?

A. I didn't pay attention to the Viz-aid. I have seen a lot of fixtures together.

Q. You don't want to have your testimony show that you had not seen a Viz-aid Day-Brite fixture like Plaintiff's Exhibit 13 before you made this change of design in Plaintiff's Exhibit 19? [361]

A. I didn't know three years ago there was a Viz-aid. I have seen a lot of fixtures in a group.

Q. Had you or had you not seen the plaintiff's Viz-aid fixture, Plaintiff's Exhibit 13, before you made this change in your design?

A. Before I made this design?

Q. Yes.

A. I couldn't remember exactly. I don't think I have seen it. I won't say "Yes," and I won't say "No."

Q. Now, I direct your attention to Defendant's Exhibit F, and to page 5 thereof, showing the 1210 series of Sunbeam, and to Defendant's Exhibit E, page 11, showing the L 1210 series fixture of Sunbeam. It is a fact, isn't it, that some employees of yours formed or went to work for the Sunbeam Company? A. They formed it. [362]

(Testimony of Benjamin Ruby.)

Q. Well, do you regard this 1210 series of the Sunbeam light fixtures, which I have identified in Defendant's Exhibits E and F, as being a copy of your fixture, Plaintiff's Exhibits 14 and 15?

A. No. I would say it is a similar fixture.

* * *

Q. Do you think this Sunbeam fixture, 1210, for identification, is in its over-all appearance, general appearance, eye appeal, substantially the same as your Paramount fixture?

* * *

A. Not the same, but they look close. [363]

* * *

Q. Well, do you think that an ordinary purchaser, giving ordinary attention to the Sunbeam fixture 1210 I have identified, would be confused into thinking that was the same as your Paramount fixture?

A. I don't think so. [364]

* * *

Mr. Foster: Therefore, at this time, it can come as nothing new that the plaintiff moves for leave of court, pursuant to the federal rules, to amend its complaint to conform to the evidence, by adding to the two counts contained in the original a third count, which I proffer, which alleges, in general, the creation of a market and demand for the patented product, and the appropriation of that market as unfair competition both in aggravation of damages

from the patent infringement and as a wrong in itself. So that this time the plaintiff moves for leave to file a first amendment to its complaint. [367]

* * *

So that I urge upon your Honor that the amendment sought to be made by this motion introduces no new issues in the case, it requires no new evidence to support it, and can therefore be subject to no valid objection by the defendant. The same acts that constitute the patent infringement constitute support for the allegation of wrong contained in this first amendment, the subject of this motion. [368]

* * *

Mr. Foster: Your Honor, I have no objection if the court prefers to take the motion under submission. We have no additional evidence to present. The plaintiff has put in its proof and is hereby closing its prima facie case. [372]

* * *

The Court: When did you first decide you were going to set forth a cause of action of unfair competition? [378]

* * *

Mr. Foster: I cannot represent to your Honor that I did not entertain the thought of the possibility of an amendment earlier than the commencement of the trial, however, because I had considered it, and considered the fact that the evidence would be the same. But I did not know whether there would be evidence, sufficient evidence, of copying to

warrant the support of the charge of copying. [379]

* * *

MILTON B. GROSSMAN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Milton B. Grossman.

Direct Examination

By Mr. Miketta:

Q. What is your business or occupation, Mr. Grossman?

A. I am an electrical engineer in the illumination field, and I also do industrial design.

* * *

Q. Have you been previously in the employ of the defendant to this action? [388]

A. Yes, sir.

Q. Ruby Lighting? A. Yes, sir.

Q. Will you please tell us what was your first experience in the lighting field, when it occurred, and what were your duties?

A. I did industrial design back in New York in connection with Central Buying Offices, which managed, operated, and purchased equipment for retail stores, department stores, specialty stores. I had the job of working on store layout, store air-conditioning, store illumination, assisting buyers in the selection of equipment, the appearance of equip-

(Testimony of Milton B. Grossman.)

ment, calling for changes of equipment to meet certain requirements, and in general what is now termed industrial design in the retail field.

Q. During what years were you so occupied with the Central Buying Offices?

A. From about 1932 to 1942.

Q. Prior to 1932 what did you do?

A. I was in merchandising work, marketing and merchandising work.

Q. What did you do between 1942 and, say 1947?

* * *

A. From 1942 to 1945 I was in the Army, [389] France, Belgium, E.T.O.

Q. When did you return from service?

A. 1945, October. 1945 to 1947 I was here in L. A. attending USC and also working as an engineer and industrial designer, getting my degree at USC.

Q. You are familiar with fluorescent tube fixtures, I take it?

A. Yes, sir.

Q. Approximately when were fluorescent tube fixtures first employed commercially or fairly extensively?

A. Well, the inception of the presentation commercially of fluorescent tubes occurred, to the best of my recollection, at the World's Fair in 1939.

* * *

Q. Do fluorescent tubes come in any specified sizes or standardized sizes or lengths?

A. Yes, they do. The ones that have been con-

(Testimony of Milton B. Grossman.)

cerned in this case come in lengths running from six inches on up to 96 inches, in units—not units, but running pretty much six inches, 14 inches, 18 inches, 24 inches, 33 inches, 36 inches, 42 inches, 48 inches, and on up.

Q. Have you ever sold lighting fixtures? [390]

A. Yes, I have.

Q. Have you sold fluorescent lighting fixtures?

A. I have sold them in terms of doing the sales engineering work connected with it, yes.

Q. With whom did you perform the sales engineering functions for these fixtures?

A. Architects, engineers, designers, state, county and city, federal purchasing officials and their respective engineers, purchasing agents of wholesale jobbers, and also the purchasing agents of contractors.

Q. Over what period of time would you say that this sales engineering work of yours has been carried out? A. In fluorescent tubes alone, sir?

Q. Yes.

A. From the time I was out here, about, say 1947 or so.

Q. In selling fluorescent lighting fixtures what do you find to be the important criterion or criteria which your purchasers seem to be interested [391] in?

* * *

The Witness: If I had to phrase it in one word, I would say illumination efficiency. But the criteria are many-fold and they consist of items such as

(Testimony of Milton B. Grossman.)

shielding, surface brightness of certain sections, method by which the light is distributed, as to whether the unit is totally indirect, totally direct, semi-indirect and so forth, categories that have been established in rather rigid channels by such sets of valuations as Fleur-O-Lier and RLM specifications, specifications as to the strength and type of material from which the unit is made, transmission qualities of those parts of the unit that are either translucent or transparent, reflective qualities of those parts of the units or finishes of the units that are impinged on by light coming from the illuminating source, mechanical operational factors that would make for ease of maintenance, removal of tube, ease of cleaning of the unit, mechanical features that would make for long life in terms of handling of the unit by the average maintenance man [392] or janitor, stability of structure of the unit, and possibly 15 or 20 other functional specifications that have appeared in the Fleur-O-Lier specs or RLM specs, depending on what type of unit it is, or that have appeared in government specs, and which are the basis and the criteria used by those who either specify or purchase fluorescent fixtures. ETL—do you want me to continue?

Q. Have you finished your answer?

A. No. ETL test values, such as distribution patterns, coefficients of utilizations, angular dispersions, percentages upward or downward, cut-off angles, absence of glare points. I think that would be enough for the moment.

(Testimony of Milton B. Grossman.)

Q. You mentioned ETL reports. I hand you a copy of Defendant's Exhibit H, for identification. Will you please state what that is?

A. It is a reproduction of an electrical testing laboratory report showing the candlepower distribution of Ruby No. 302 unit tested in a suspension mounted condition, and it is given the title of general diffuse type of fixture. It shows a set of distribution curves on three axis used for the tests. It shows brightness factors for the different angles and different positions; it shows zonal distribution and zonal lumens; it shows light flux values and efficiencies, and it indicates the general form of the fixture in its cross-sectional outline, although the dimensions are incorrect. [393]

Q. You are familiar with this report?

A. Yes, sir.

Q. And this Ruby Fixture No. 302 is the type of fixture which is here as Plaintiff's Exhibit 14 and 15, similar to the one on the standard?

A. It is.

* * *

Mr. Miketta: I wish to introduce Defendant's Exhibit H into evidence, your Honor.

* * *

The Court: The objection is overruled and the document is admitted as Defendant's Exhibit H.

* * *

Q. (By Mr. Miketta): You have utilized ETL

(Testimony of Milton B. Grossman.)

reports similar to Defendant's Exhibit H in your sales engineering work, Mr. Grossman?

A. Yes, sir.

Q. Do you find that such reports indicating the light distribution and other factors to which you have referred are important in making sales of fixtures?

* * *

The Witness: It has been my experience in the last two years that not only are they important, but they are the prime key in the acceptance and specification of lighting fixtures today.

Q. (By Mr. Miketta): In the course of your work with [395] Ruby Lighting Corporation did you have anything to do with the plaintiff's Exhibit 20? A. Yes, sir.

Q. What did you do in connection with that?

A. I wrote, laid out, and designed and supervised the production of that entire data book.

Q. So that you are familiar with all of the fixtures that are illustrated, described and shown in this publication, is that correct?

A. Yes, sir.

Q. I believe in the course of your testimony you had reference to specs. What did you mean by "specs"? A. Specifications.

Q. Specifications of purchasers?

A. Specifications set down either by the purchaser or set down by accepted organizations such as the Fleur-O-Lier specification set-up or the Bureau of Standards, or the Illuminating Engineers

(Testimony of Milton B. Grossman.)

Society in their sets of specifications for different types of uses of fixtures.

Q. And do those specifications concern themselves with decorative or ornamental features of fixtures, or only with the functional and mechanical features?

A. Only with the functional and mechanical. [396]

* * *

Mr. Miketta: If the court please, the exhibit which I have asked be marked for identification as Exhibit I is a collection of both design patents and mechanical patents relating to fluorescent lighting fixtures. Copies of these patents have been, of course, furnished to counsel for the plaintiff. It also includes under tabbed items photostatic copies of various publications, including the *Illuminating Engineering*, which also appears in some other exhibits, and a "Review of Fluorescent Luminaire Design" under the tab No. 21. I believe in view of the written stipulation which we have, Mr. Foster, that that exhibit can be admitted in evidence.

* * *

Mr. Foster: As to the book of prior patents and publications offered by the defendant, my objections for the record are two in number. One, that with respect to most [397] of the items, they are already in evidence, your Honor, in Plaintiff's Exhibits 9 and 10. They include all of the prior patents and catalogs that were pleaded by Mr. Miketta, or con-

(Testimony of Milton B. Grossman.)

cerning which he had given me notice prior to trial. The other prior patents, and they are only two that aren't already in evidence, and prior catalogs,—their use is objected to if they are to be relied upon as anticipating the patents in suit and establishing invalidity because no 30-day notice was given the plaintiff by pleading, as required by statute. If they are not to be relied upon as anticipating, that is, fully showing the designs of the patent in suit, but only to show the state of the art, the general art, and to enable a contention to be made that no invention is involved, then the plaintiff does not object to those additional ones, but objects to all of them, in that the material ones, the best ones for the defense, are already in the record.

The Court: No 30-day notice was given, was it?

Mr. Miketta: That is correct. And I do not contend that any of these patents actually anticipate the entire design patent in suit, but I offer them to show the state of the art.

Mr. Foster: We do not urge surprise at all, your Honor.

The Court: All right. Exhibit I will be admitted, and although there is a duplication in some of the patents, in the [398] patents contained in this exhibit I notice Mr. Miketta has marked and underlined certain portions of the patents to make readily apparent what parts he relies upon. In that sense it would be of some assistance to have this exhibit, from the standpoint of his contentions, as

(Testimony of Milton B. Grossman.)

well as the duplication of the patents from your standpoint. [399]

* * *

Q. (By Mr. Miketta): Mr. Grossman, based upon your knowledge of fluorescent fixtures, can you state whether 2-tube fixtures as of 1942 were commonly made? A. Yes, they were.

Q. And if you refer now to Exhibit I, item 21, which is the Review of Fluorescent Luminaire Design, imprinted from the Magazine of Light of 1940, will you point out the characteristics of fixtures which are similar to or include elements which you find in the defendant's Paramount fixture?

A. Well, on page 6, entitled, "A Review of Fluorescent Luminaire Design" on the left-hand side there are four illustrations of fixtures. The bottom one shows a fixture that typifies elements such as also are found in the Paramount fixture. For instance, there is a step-down end, as I have marked it with these notations. Then the end itself has cut-outs so that a certain amount of illumination is escaping from the end of the fixture. The fixture itself, based on the cross-section drawing, shows a "V" center reflector to aid in the cut-off or shielding of the outside tube when seen from the other side of the fixture. In the [400] bottom conformation of the fixture are seen the baffles of the fixture, and what we call in the trade the off-horizontal. It seems to be curved here, and it is typical of the curved or angular bottom, off-horizontal bottom used in the sectioning of the baffles.

(Testimony of Milton B. Grossman.)

Q. Does that Exhibit I-21, page 6, and particularly the lower item, include any comments which explain why the step-down end, as you called it, is important or functional?

A. Why, yes. It states very definitely that "The plastic sides and central member furnish shielding for crosswise view. The louvers shield for lengthwise view. The design of the upper part of the reflector is such as to direct light to the ceiling, thus eliminating objectionable ceiling contrasts." [401]

Q. What is meant by that last phrase or description, Mr. Grossman?

* * *

A. If the fixture is mounted as, for example, is the one in the court room, and were to be lit up and had a sharp contrasting differentiation between the brightness of the fixture itself and the ceiling, it would tend to become an object of glare to the eyes of a person that was in the room and using that fixture.

As a result, fixture design has attempted to eliminate that so that there is a gradation of brightness from the side or bottom surface to the brightness of the ceiling, the adjacent ceiling, somewhat in the ratio of three to one. When it gets beyond that ratio, it is considered as having a bad quality.

The Court: Which is the three,—the downward?

The Witness: The side or the bottom, sir. They take——

The Court: And one is the ceiling? [402]

The Witness: Yes, sir.

(Testimony of Milton B. Grossman.)

Q. Well, in designing a fixture, do you attempt to do anything about maintaining that light on the ceiling, even though a number of fixtures are placed in alignment?

A. Oh, yes. It is maintained by dropping the side surface so that there is some light leak either over the edge of the fixture or from the body of the fixture, or, sometimes, as in the case of the fixtures that have baffles on the top or reflectors on the top so that there isn't any direct path of light from the tubes to the adjacent ceiling, they have slots so that a certain amount of light can get to the ceiling.

Then in other cases, if you will note, for instance, as advertised by the Guth Company, which they have used for years [403] back to the acetylene, sir, they have what they call a bottom spill that shoots light to the ceiling from the bottom of the side.

Q. So that the step-down end itself has a tendency to transmit light lengthwise of the fixture against the ceiling?

A. Very definitely, as you can see from here.

Q. And, also, over the edge towards the side of the fixture; is that right?

A. Yes. And it is not only that, but that step-down is almost a requirement on fixtures of this nature. But when a test is made in electrical testing laboratories, the test is made on three planes; on a plane—that is, the fixture is located in a plane parallel with the longitudinal axis; also, in a

(Testimony of Milton B. Grossman.)

plane at right angles with the longitudinal axis; and a plane at 45 degrees to the longitudinal axis. The result is that if they didn't have a step-down on the ends of the fixture, when the test report would be evaluated in terms of zonal lumens, which you use for the computation of efficiency, the values of light that would now be seen or could be seen in fixtures like this, coming from the sides and the ends, would not appear on the tests, and the fixture would be relatively an inefficient fixture.

Q. Is it also true, Mr. Grossman, that the overall length of the fixture is made as close to the length of the [404] tube that is contained in the fixture in order to prevent dead spots, you may say, or dark spots between adjacent fixtures, when they are in alignment? A. Yes, sir. [405]

Q. Do you find any other instances where V-shaped longitudinal louvers have been combined with transverse louvers in prior suggestions as shown in Exhibit I-21?

A. Yes, sir, on page 8, the bottom fixture on the left-hand side shows V-shaped lengthwise louvers.

Q. As well as transverse louvers?

A. As well as transverse louvers, sir.

Q. Do you find any other instance of prior fixtures which embody some of the characteristics of the defendant's fixture in Exhibit I-21?

A. Yes. On page 10, the upper left-hand fixture indicates very much what I just discussed. It has a step-down end. Of course, that step-down isn't

(Testimony of Milton B. Grossman.)

required so much when it is on a pendant like that. But if that fixture were hung on a ceiling it would be required. It also shows a cutout and permits some light to come through.

I see I made a notation on this. The second fixture in that column on page 10 shows a typical bracing of the side, reinforcing straps on the side, straps that hold the panels on the side.

Q. Between the upper and lower rails?

A. Yes, sir. And on page 13 there is a V-shaped fixture which again indicates the step-down end, the cutout end, and side reinforcement of the sustaining rails or bands for the side panel. That is the one on the upper left. [406]

The Court: On page 13?

The Witness: Yes. The second one down on the right on that same page indicates illuminated end cutouts. And I notice that I made a notation here of arrow-tail form.

Q. (By Mr. Miketta): What do you mean by that?

A. That in terms of a resulting pattern that results from the form—the functional form of getting two pieces of glass and then putting an end cap on it and, bang, you have an outline of an arrow which results purely from the function.

Q. What is the function of the inclined sides?

A. In order to get luminous surfaces at an angle off the perpendicular.

Q. What does that accomplish?

(Testimony of Milton B. Grossman.)

A. It accomplishes a better transmission of light to the working surface.

Q. Do you mean downwardly?

A. Downwardly. Insofar as the light is directed proportional to the cosine of the angle between the vertical and the normal to whatever the plane is. If the angle were closer to 90 degrees or vertical, the efficiency of that surface in delivering light to a horizontal working surface would be that much lessened.

I notice also on page 14 the second fixture down on the right, under the Fleur-O-Lier label, Electrical Testing Laboratory label, it also has a step-down end, it has a cross-section [407] that is identical to the type of cross-section that the Ruby fixture has, and it has bracings or straps on the side, middle, between the upper and lower railings, holding the fixture panel; and on page 15 on the left-hand side, the second illustration, there is a fixture that shows a step-down end, it shows a textured surface on the end that very much uses the kind of texturing that we use on the casting of the Ruby end insofar as it incorporates a floral pattern and an indented, different surface, and on top of that has cutouts evidently for the same reason that we most likely have, I can speculate, to save metal and to permit light to come through the end of the fixture. Those are the notations I see.

Q. Mr. Grossman, it is my understanding from testimony given here previously and from your description, that every fixture has to distribute light,

(Testimony of Milton B. Grossman.)

that is its primary function, and it has to distribute it in various directions, that the louvered bottom performs the function of preventing glare, the inclined sides direct the light downwardly, the space between the upper edges of the side permits light to be cast upon the ceiling, the step-down end of the fixture permits light to be thrown against the ceiling, the length of the fixture is a function of the tube length; do you find any element of a fixture which I have not named and which is not functional?

A. I don't like the way, frankly, you phrase it, Mr. [408] Miketta. Do you mean the result of a function?

Q. Do all those elements or angles perform a function or purpose which aids in the distribution of light from the fixture?

A. Yes, sir, they [409] do.

Q. Now, in addition to that, you do find some ornamentation applied to the end of most of these fixtures, do you not?

A. Yes, that is the end factor.

Q. And as I understand your testimony, the ornamentation which appears in the defendant's fixtures in the form of those cut-outs is also, at least partly, functional in that it permits light to be distributed towards the end of the fixture?

A. Yes, sir.

Q. And pass through those ends, is that correct?

A. Yes.

Q. Mr. Grossman, do you know the range in

(Testimony of Milton B. Grossman.)

height of the generally acceptable common fluorescent tube fixture as of 1942?

* * *

The Court: Range in height, do you mean from the floor?

Mr. Miketta: No. Speaking of the fixture itself, your Honor.

The Court: The depth of the fixture?

Mr. Miketta: Yes, we can call it the depth, as opposed to the width? [410]

* * *

A. I should say they vary, sir, in the one-lamp fixtures about four inches, but in two-lamp fixtures they would run from 6 to 7½ or 8 inches.

Q. Now, lets just concentrate on the two-tube fixtures as of 1942. Do you know the range in width, transverse width, of those fixtures?

A. Yes, sir. In the main I would say they are from 12 to 17½, 18 inches maximum in width.

Q. Do you know what the cut-off angle acceptable, or let's say, the common ordinarily manufactured two-tube fixtures, was as of about 1942?

A. From 27 to 30, 32 degrees.

Q. In recent years has there been any change in the cut-off requirements?

A. Yes, sir, the cut-off or shielding angle has increased as lighting sources have increased in brilliancy, fluorescent lighting sources. They are now talking as almost a standard requirement 45 degrees

(Testimony of Milton B. Grossman.)

being the required cut-off angle on specifications.

Q. That is just within the last year or two?

A. Yes, sir.

Q. In designing a fixture, would you try to [411] maintain the overall dimensions within the acceptable size range that you have previously mentioned?

* * *

The Witness: Yes, I would. [412]

* * *

Q. If you were attempting to design this fixture, for example, or a fixture as of 1942, what limitations would you have to meet or have to take into consideration in designing such a fixture? Perhaps you don't understand my question.

A. I do. I was just trying to think.

Q. One of the limitations is, of course, the length of tube you are going to use?

A. That's right, there would be the limitation of the length of tube, the limitation of shielding that tube, either [413] arriving at the amount of shielding analytically, if I were an engineer at that time, or—at that time I wasn't an engineer, I would have done it empirically, cut and try.

Q. How would you do it empirically?

A. Cut and try. I would have mounted a tube on some sort of housing that had a ballast in it. That, of course, would establish the depth of the housing, due to the girth of the ballast. I would have mounted sockets on the housing. As a matter

(Testimony of Milton B. Grossman.)

of fact, I think there is a bare housing here that would illustrate. Then I would mount the two tubes on it, never touch pencil or paper, and with pieces of some translucent material, glass or plastic, I would arrive at what would be an evenly illuminated side shielding that wouldn't have any glare spot running down through it. And then I would arrive at some approximation of what in the trade was acceptable in the way of shielding, form of shielding, baffles or egg crate louvers.

Q. I think, Mr. Grossman, you have a sketch there which demonstrates how you would go about in this crude way determining the overall dimensions of a fixture and of transverse shielding, have you not? A. Yes.

Mr. Miketta: May I have these marked for identification first, your Honor? [414]

The Court: They may be marked.

The Clerk: J-1 and J-2 for identification.

* * *

Q. (By Mr. Miketta): What is this central red line area, Mr. Grossman?

A. It shows the cross-hatchings in red of a trapezoidal form which approximates the cross-section of the Paramount body and reflector, the Ruby Paramount fixture body and reflector.

Q. The chassis?

A. The chassis or the body. In the trade it is called the body. Adjacent to it and approximately the distance away that a fluorescent tube is nor-

(Testimony of Milton B. Grossman.)

mally placed is shown a circle to represent the circumference of the 11½ inch T-12 fluorescent tube.

Q. Does that tube have to be spaced a certain minimum distance from the ballast box or can?

A. Yes. Not by any law, but by both design factors, experience, and also the fact that if you get it too close you have a tendency to heat too much. There isn't a chance for [416] evacuation by conduction and that nature. So we make it about a quarter of an inch normally away from the tube. Incidentally, I would like to say—

The Court: You show it at about 3/8ths there?

* * *

A. A trifle over a quarter, but it is rough pencil. A little under 5/16ths. [417]

Q. By Mr. Miketta: What is this bottom line that you have drawn there?

A. The bottom line represents where a bottom surface of some form, either reflective surface or transmitting surface like glass would be put, and it also represents the bottom in case of a reflective surface, such as baffles or egg-shaped louvers of what would be the shielding unit used, whether it is a baffle as we have here, or an egg-shaped louver, type of rectangular louver, and that we use an optimum dimension of two inches.

The Court: What?

The Witness: A dimension of two inches in height for the baffle as an average. Sometimes the baffle doesn't have a rectangular shape, so we use

(Testimony of Milton B. Grossman.)

an average figure of two inches. The shape may run all the way from $2\frac{1}{2}$ down to a half inch. [418]

A. This 6-inch dimension is a resultant dimension, not a primary one. It results from the fact that the tube is placed on this body which is housed around a ballast of a certain dimension, and then from the tube we try to get to a point or a plane that represents two inches below the bottom point of the tube that we might be wanting to shield.

Q. All right. Now, suppose that baffle is going to be two inches high, where do we go from there? How do we establish the number of those transverse baffles?

A. The numbers are resultants. We don't establish them. The numbers are definitely resultant. If we want to get a shielding that represents 30 degrees—I am looking now at another sheet.

Q. That is J-2.

A. Called J-2. If we took a triangle where the height of the baffle or the average height of the baffle, or the altitude——

Q. Is that indicated here on the left-hand side?

A. Yes, they show it here as two inches. The tangent of [419] the angle of 30 degrees is 0.557, and if that ratio is worked out, I think you will find it comes to 3.5, I will say, approximately.

Q. Mr. Grossman, couldn't you just draw that vertical representation that is 2 inches long, draw your diagonal of 30 degrees, then just scale off this distance?

(Testimony of Milton B. Grossman.)

A. Sure. But I don't do it that way. I do it mathematically.

Q. But suppose you did scale that off, how much would that come out to?

A. Approximately three and a half, 3.5.

Q. Your tube is 48 inches long, divide that by 3.5, or how many times 3.5 would give you the 48 inches or thereabouts? A. 13, 14.

Q. So you would have about 14 spaces, is that right? A. Yes.

Q. Three and a half times 14, that gives you 49 inches.

The Court: Of course that is all predicated on a 2-inch baffle?

The Witness: Yes. An average, sir, of 2 inches. In the case of this unit we struck an average, in checking it over before it went into this new data book, we struck an average of 2 inches, because the unit varies from about almost two and three-quarters in height—that is, the baffle does—down to about a half inch where it joins the frame on the side. But the height from the bottom of the tube to where we want [420] the bottom of the baffle to be was approximately two inches.

The Court: I don't think they will be of too much probative value, but I will permit their introduction. J-1 and J-2 in evidence.

Q. (By Mr. Miketta): Have you ever designed fixtures in accordance with—not in accordance with, but for the purpose of fulfilling a specification that had been submitted? A. Oh, yes, quite often.

(Testimony of Milton B. Grossman.)

Q. And those specifications do not call for any particular ornamental design, do they, Mr. Grossman?

A. Never to my knowledge have I seen a spec where an ornamental design in any way has been specified * * *. But I have never seen a specific ornamentation, shape, or so forth, specified. [421]

Q. Are you familiar with the type of fixture which is illustrated in Defendant's Exhibit I-3?

A. Yes, sir.

Q. Does that illustrate any characteristics common to the fixture made by the defendant here and forming the subject of this action, and, if so, please identify those characteristics?

A. This is a classic U.R.C. type of fixture, U.R.C. being——

Q. Just point to the characteristics that are similar, and identify them.

A. Well, it covers the knock-outs on the end with a circular three-dimensional plate. It has what we have been calling step-down ends. It has sloping sides of glass, evidently, from the appearance here. It has patterned cut-outs in the end plate in order to possibly lighten the metal—I think they are cut-outs from this illustration—to lighten the metal, and, also, to let light come through the ends, so as to be transparent.

Q. Now, I call your attention to Exhibit I-7, which is the Masterson patent, and ask you if you see any characteristics or elements there that are common to the defendant's device.

(Testimony of Milton B. Grossman.)

A. Well, this—I am looking at Fig. 2, and the cross-section shows a sloping bottom, the [422] baffles off-horizontally, and it shows a V-shaped central body, which is also a V-shaped central cut-off unit, equivalent to and functions in the same way as the V-shaped longitudinal unit in the Ruby Paramount. It shows both crosswise and lengthwise louvers or baffles, and it shows side panels that are transparent. That is noted in Fig. 1 as No. 2.

Q. I call your attention to Exhibit I-11, and may I ask this question, in order to expedite it:

Is it not correct, Mr. Grossman, that this also shows a fluorescent tube fixture, with a normally open bottom, inclined upwardly and outwardly transparent sides, an end plate in Figure 5, which is of the step-down type and permits light to be discharged against the ceiling, and I believe it states that the V-shaped louver identified by the numeral 30 acts as a louver and a reflector; is that about correct?

A. Yes, sir. [423]

* * *

Q. (By Mr. Miketta): Mr. Grossman, can you identify Exhibit G, for identification, items 1 to 11?

The Court: Did you make these drawings?

The Witness: They were made under my supervision, sir. I am checking.

The Court: What is No. 1—a cross-section of the Ruby louver? [424]

The Witness: Yes. It is a cross-section of a drawing made from old catalog data of these Ruby fixtures. That catalog was dated 1941.

(Testimony of Milton B. Grossman.)

Q. (By Mr. Miketta): Is that drawing approximately to scale, Mr. Grossman?

A. Yes. If I recall correctly, we did these drawings at half-scale, that is, a half inch equal to one inch.

Q. What is item 2 of Exhibit G?

A. That is a louver II, a four-light type of fixture.

Q. Made by?

A. Made by Ruby. It is dated 1941 and it shows an open-end light. It shows off-ceiling ends, and it shows sloping sides, and cut-off angles.

Q. And the data was taken from a 1941 Ruby catalog; is that correct? A. Yes, sir.

Q. Now, item 3 of Exhibit G?

A. The item 3 is a Ruby Admiral, dated 1941, and it shows a step-down end, and it shows a sloping side, and it shows the bottom there.

Q. Item 4 of Exhibit G is what?

A. That is a fixture I was curious about. [425] When I gave a deposition to Mr. Foster, he brought out a lot of old catalogs, and one of them was one I had never heard of, the Gill Company. So I went to some effort and dug up this Gill catalog, and this is one of the fixtures I found in it, and typifies the sloping side and the dropped end.

Q. Was that in 1941?

A. Yes, sir. That was dated 1941, too.

Q. And item 5 is what?

A. This is also an old Ruby fixture, and it is a sort of grand-daddy to the present Ruby Regent,

(Testimony of Milton B. Grossman.)

with sloping sides, step-down ends and baffle bottom, and a good angle of cut-off, by the way.

Q. Does that have longitudinal and transverse baffles?

A. Yes, it has both longitudinal and transverse baffles.

Q. Now, No. 6.

A. This is a fixture entitled "Garcy-Gram Unit," dated 1941. As I recall, this is another fixture I dug up after the deposition. It shows sloping sides. It is the only fixture, by the way, in this whole group that doesn't have a step-down, but it has sloping sides and the off-horizontal bottom, and translucent side panels.

Q. And both longitudinal and transverse baffles?

A. Yes, it did.

Q. Item 7 is what?

A. That is another one of the Gill fixtures, step-down end, and [426] instead of sloping, it had angular curved sides put in at an angle off the vertical. It is dated 1941 also.

Q. The figure on tab 8 is simply a depiction of the Ruby Paramount fixture; is that correct?

A. Yes, it is.

Q. And Figure 9—

The Court: Just a moment. What do you mean on 8 when you say "greater angle than Viz-Aid," referring to the bottom?

The Witness: The angle between the horizontal and the bottom line on either side of the baffle, of the cross-wise baffle, we attempted to evaluate from

(Testimony of Milton B. Grossman.)

the samples available to us or the drawings available to us. If I recall correctly, this one was based on two pieces of louvers that we had that had been taken out temporarily of a Paramount unit, and out of a Viz-aid unit, and then we evaluated the angles. It was different.

* * *

Q. (By Mr. Miketta): You are referring to tab 10 of Exhibit G. A. Yes, sir; that's right.

Q. Does that show the comparison between the transverse louvers [427] of the defendant's fixture and of the Viz-aid?

A. Yes, sir. We did this very precisely at that time. As I look at this, well,—

Q. What are the differences?

A. Well, the differences are these. There is a difference in depth between the Ruby and the Day-Brite fixture the Ruby and the Day-Brite baffle. The Day-Brite baffle is deeper in the dimension taken from some line that might be called the top line. It has a cut-out on top of the baffle to accommodate the close proximity to the tube. The Ruby one doesn't need that because it is shaped thinner. It is a two-dimensional baffle, and not only is it formed in a crosswise plane, it is two-dimensional and it is also formed on two planes perpendicularly to the cross plane, in order to accommodate the method they use of attaching their baffle to the entire frame of the unit.

The Ruby baffle is one-dimensional, one single plane unit, that is fitted into slots on the railing that

(Testimony of Milton B. Grossman.)

made up the baffle frame. The form of the "V" in the Ruby baffle, or the form of the aperture in the center of the Ruby baffle, in order to fit it around the Ruby V-shaped longitudinal louver, is a complete "V," while the form of the Day-Brite one is a truncated triangle or keystone, because the Day-Brite unit had a slot in there.

Q. That truncation you referred to is represented by [428] the horizontal solid line which appears to bisect the dotted "V" of the Paramount?

A. Yes, sir. The complete angles were different, too.

The Court: Which subdivision are you referring to now?

Mr. Miketta: That is tab 10. That is the comparison.

The Court: Tab 10 shows superimposed a solid and a dotted baffle, and the notations indicate that the solid is the Day-Brite and the dotted is the Ruby?

Mr. Miketta: That is correct. [429]

* * *

Q. Mr. Grossman, you called attention to the fact that the louver assembly of the defendant's fixture is arranged differently from that of the plaintiff's Viz-aïd fixture. Does that mode of assembly also change the appearance of the fixture?

A. Quite definitely.

(Testimony of Milton B. Grossman.)

Q. In which way? Will you point it out, please? From where you stand, can you do that?

A. The Ruby fixture, since its baffles are [430] attached to a separate frame, also has a line of illumination between the side panel and the frame that houses the baffles. In other words, the whole baffle section is a completely separate unit.

* * *

Q. (By Mr. Miketta): And that line of light would extend completely across the fixture?

A. Yes, sir.

The Court: That is Plaintiff's Exhibit 14 or 15 you have up there?

Mr. Miketta: That is 15, your Honor. This is the four-tube light.

The Court: Being one of the accused devices.

The Witness: As a result of that mechanical form of baffle housing, the end plate has quite a different, completely [431] different shape than the type of end plate that they use on the Viz-aid fixture. It has slots in it. It is all of one piece. It doesn't consist of a part that swings down with the baffles. It exists simply as a supporting member, to support the side panels, and it exists functionally to support the side panels on the panel housing.

Q. (By Mr. Miketta): Mr. Grossman, have you examined the plaintiff's Day-Brite fixture, as well as the defendant's Ruby fixtures?

A. Yes, I did.

Q. And you have been able to find approximately

(Testimony of Milton B. Grossman.)

18 or 19 differences between the plaintiff's fixture and the defendant's fixture?

A. I have, sir.

* * *

The Court: We let the plaintiff put in his contentions of similarity as just contentions, and you may offer this as your list of contentions with the understanding that if you interrogated your witness he would say each one of those is a point of difference. [432]

* * *

The Court: I want to ask a question or two here. Your cut-off point or your cut-off angle on any one of these lighting fixtures could or would vary with the height of the fixture above the work surface, would it not? For instance, supposing I have a small room and I need light at some distance from the fixture, your cut-off angle, meaning that angle of a baffle which would prevent me sitting at a work table, say, from having the globe shine in my eyes,—could be a very small angle?

The Witness: Yes, sir; except this——

The Court: On the other hand, if I had a fixture directly over my head at a work surface, probably no baffle would cut off the direct light from shining in my eyes, if I [433] looked up into it?

The Witness: If you looked up to it, sir. But that isn't how fixtures are designed or tested for their limitations. You are considered to have an optical angle of approximately 60 degrees; 30 degrees above the horizontal and 30 degrees below.

(Testimony of Milton B. Grossman.)

That was the whole consideration. That is why the cut-off, which establishes an optimum norm of 30 degrees,——

The Court: It is only a norm?

The Witness: It is a norm.

The Court: Depending on where the person would put the fixture, how far the fixture would be from the work surface, or, how far the fixture would be removed from the work surface?

The Witness: Yes, sir. But when it is stated in terms of test value, it is stated in terms of the geometric relationship between the baffle sides, the differences between them, and the length and width of the fixture.

The Court: Now, directing your attention to the side panel of glass, I am going to take, for example, Plaintiff's Exhibit 15 in evidence, one of the Ruby accused fixtures. I take it the side panel is made of glass instead of metal in order to allow light to go through it?

The Witness: Yes, sir.

The Court: If you didn't want light to go through it, [434] you would make that of solid metal?

The Witness: Yes, sir. [435]

* * *

The Court: Let's contrast the side panel in the shape of the Ruby light, Exhibit 15, where the bottom portion of the panel is closer to the center of the fixture, and the top part of the panel is fur-

(Testimony of Milton B. Grossman.)

ther away, and the degree may be from the eye, oh, 60 degrees or more than 45 from the vertical plane, —is that about right?

The Witness: As in this fixture, yes, sir; approximately.

The Court: Contrast that with one where the degree of angle from the vertical plane would be almost reversed, and take you over past 90 and, say, 100 or 110 degrees from the vertical plane. The supposed panel I am talking about would supply through the panel more light to the ceiling than the panel which we have here in Exhibit 15, would it not? I am talking about the panel now.

The Witness: This panel supplies no light to the ceiling, sir. This panel—the only light this panel supplies is by reflection from the inner surface of the panel, and very little possibly from the top of the panel.

The Court: In other words, on this Ruby light the panel is designed with that angle, to reflect light downwards?

The Witness: To transmit light downwards, sir, and reflecting the light upwards.

The Court: And if you wanted it to transmit more light downwards, you would increase the angle, would you not? [436] In other words, supposing instead of being at a 60-degree angle, you would have 45 degrees. Wouldn't there ordinarily be more light transmitted downward and less to the sides?

The Witness: That would only be permissible design-wise if your tube position could be varied,

(Testimony of Milton B. Grossman.)

too. But the position of the tube controls the position of the angle of that panel. That panel is approximately at right angles to the diameter of the tube, which is in relation to the surface out of which the tube sockets come in. I might be able to show the judge with that body over there what I mean. [437]

* * *

The Court: When you refer to the relation of the tube to the body you refer to taking on G-8 the position of the tube and the line running through the center of the tube at right angles to that portion of the chassis or can?

The Witness: Yes.

* * *

The Court: The angle now shown as 70 degrees from a vertical plane, supposing the angle on the side panel were 45 degrees, what would be the effect on light coming from that bulb?

The Witness: You would be sending more light up to the ceiling.

The Court: By reflection?

The Witness: By reflection, and also direct transmission, if I may point out. If the angle were at, say, 30 [438] degrees off the vertical, all of this open space then would permit lights to go up, there would be additional reflection, and you would have a relatively——

The Court: What about the light that went through the panel?

The Witness: You would get a little better trans-

(Testimony of Milton B. Grossman.)

mission of light through the panel, sir, because the panel would be normal, then, to the axis, cross-sectional axis of the tube.

The Court: Isn't there involved, also, the refraction of light through glass?

The Witness: Yes. We use plastic a lot. In looking at that fixture I wouldn't be able to tell you now whether it is glass or plastic. They are approximately identical in refractive index. And that enters into it, too, sir.

The Court: By refraction you mean turning the course of a direct light ray?

The Witness: Yes, sir, slowing it down, so to speak, and swinging it off its original path.

The Court: So that by varying the slope of the panel you get various results?

The Witness: Yes, sir. In the old days, if I may enlarge on that, based on experience with incandescents, the work was done empirically on a cut and try basis, working with glass, shaping glass. The old fixture manufacturers used to have their own glass-forming departments which molded glass, [439] shaped glass and cut glass, to be able by cut, make and trim to arrive at proper things. They didn't use the analytical approach that we use today.

The Court: Counsel, are you going to offer your Exhibit G in evidence?

Mr. Miketta: If you please. May I offer that in evidence?

The Court: It will be received.

(Testimony of Milton B. Grossman.)

Q. (By Mr. Miketta: Have you measured the angle from the vertical of the glass circular fixture which is in the District Court Clerk's room and all over this building?

A. I did. I measured it this morning when I came in.

Q. What is the angle of inclination of that side?

A. It is approximately 20 degrees off the vertical or 70 degrees off the horizontal.

Mr. Miketta: May the court please, I would like to have the court's authority to take a photograph of this particular fixture and introduce the photograph in evidence. I don't believe the building inspector would want me to make this a permanent exhibit. [440]

The Court: You may put a photograph in evidence and in that way preserve the building's fixture. We will assign it a number. What will it be, Mr. Clerk?

The Clerk: Defendant's Exhibit L, your [441] Honor.

* * *

Cross-Examination

By Mr. Foster:

Q. Mr. Grossman, while you were with the defendant corporation did you ever actually sell any fixtures to users of the fixtures?

A. Yes, sir, to the agents of the users.

Q. You never sold any lighting fixtures for the

(Testimony of Milton B. Grossman.)

defendant corporation directly to the ultimate users of those fixtures, did you?

A. Yes, I did. [446]

Q. On how many instances? There were very few instances, weren't there?

A. No, sir; innumerable instances.

Q. You listed at length in the record yesterday the criteria in which the purchasers of lighting fixtures like Plaintiff's Exhibits 14 and 15, the Ruby fixture, are interested when they buy lighting fixtures, such as the distribution patterns and the coefficients of utilization, angular dispersions, percentages upward or downward, absence of glare points, and so and so on. Is it necessary to take all of these various qualities or criteria into consideration in designing a fixture for fluorescent lamps which is to be commercially successful?

A. Yes, sir. Are you referring to the fixture on the stand now?

Q. Yes.

A. The two-tube and four-tube Ruby Paramount fixture?

Q. Yes. You understood that in answering my question?

A. I took it for granted that is what you meant.

Q. And from the little I understand about all of these criteria and qualities, they appear to be so technical that for one to design a commercially successful fixture, paying attention to all of them, it would require technical training such as yours in the lighting field, is that true, Mr. Grossman? [447]

(Testimony of Milton B. Grossman.)

A. No, sir, that isn't true. And it isn't true any more than it would be true if you said to Edison when he was alive, "You couldn't invent these things, you are not an engineer." But Edison did invent them by a cut and try method. [448]

* * *

Q. (By Mr. Foster): At any rate, there is not much hope of commercial success for a fluorescent light fixture which does not fulfill these criteria and requirements that you enumerated yesterday, the examples of which I have given today; that is correct, isn't it?

A. No, sir. You are quite correct.

Q. Now, in order to determine all of these criteria which you mentioned yesterday, and a part of which I have given today, you mentioned also surface brightness of certain sections, the method by which the lighting is distributed, specifications as to the strength of the material, transmission qualities of certain parts, reflective qualities of other parts, and so forth, and you mentioned possibly 15 other specifications. In determining whether a fixture of a given design has all of these qualifications or qualities or criteria, I suppose you need a light meter?

A. That would be one instrument.

Q. There would be other instruments you would need in order to do a job of determining whether the fixture met those specifications and requirements; is that correct? [449]

A. It would be today, but it wasn't in the past.

(Testimony of Milton B. Grossman.)

Q. Well, what would be needed today?

A. Today a firm would have to have a distribution photometer, a brightness meter something like the Lukiesch-Taylor meter; it would have to have volt meters and ammeters. It would have to have reflectance meters—either Gross meters of direct reflectance, photometers, and some other measurement instruments of a similar nature, if they wanted to make a strict, rigid, technical evaluation of the unit to meet today's requirements.

* * *

Q. When was it you went to work for Ruby, the defendant here? A. Around July, 1947.

Q. What, of the apparatus you have just described did [450] you see there when you went to work for Ruby in the defendant's plant?

A. They had photometers.

Q. What else, that you have described?

A. They had ammeters, and I think I saw a volt-meter there. I am not sure.

Q. Is that all that you have described that you would need today, that you saw there?

A. That's all. Then measuring instruments of various types. [451]

* * *

Q. But prior to your employment by Ruby in July, 1947, when the Paramount design, Plaintiff's Exhibit 14 and 15, was on the market, you had had nothing to do with the design, or had you?

A. No, sir.

(Testimony of Milton B. Grossman.)

Q. Did you make subsequently a re-design of that Paramount fixture to improve its functional design?

A. Yes, sir. I recall that we worked on the functional requirements of making the movement of the baffle easier for the maintenance man. We worked out a method of using the Ruby, exclusively Ruby spring latch deal, so that the maintenance man would not have to move the whole baffle frame laterally in order to open it up. That was one of the things. And there were some other elements of design that I recall working on. Specifically—I mean I don't recall the specific elements, but we did work on various functional maintenance elements of it. [452]

Q. When did you do this redesigning of the Paramount fixture, Plaintiff's Exhibit 14 and 15?

A. During the period that I was working on the new data book from about July to December, 1948.

* * *

Q. Did you make any recommendations to the defendant corporation in December, 1948, or later, that you be authorized by the defendant to further revise the design of the Paramount fixture?

A. The only recommendation——

Q. Did you or didn't you, please, sir? Did you make such a recommendation or did you not?

A. No, I didn't, sir.

Q. Very well. In the redesigning of the Paramount fixture which you did for the defendant between July 1948 and December 1948, you did not change any of the decorations on the end cap or on

(Testimony of Milton B. Grossman.)

the medallion at the middle of the sides of the fixtures, did you?

A. I couldn't answer that question. Some redesigning of the casting was done as a result of a change in the form of the casting, and whether the patterning that resulted from that change in form is identical in this fixture to what it was prior to my being with Ruby I couldn't answer right now.

Q. What I would like you to do, and please listen carefully to this question, Mr. Grossman, is to list those differences in the appearance of the decoration upon the ends of the fixtures, Plaintiff's Exhibit 14 and 15, and the medallion in the middle of the sides of the fixtures, which you changed in revising the design in 1948, between July and December [454] to provide a more functional design.

A. I couldn't do it, sir. I have no knowledge.

Q. Did you change the overall length of the fixture in that redesign to provide a more functional design?

A. The length might have been changed because the casting, as I recall, was made a little thinner.

Q. Do you recall that you did increase or vary the length?

A. No, sir, I couldn't swear that I did.

Q. Do you recall that you changed the overall height of the fixture? A. No, sir.

Q. Did you change the overall width of the fixture?

A. I think the width on the redesign might have been changed, because we were attempting to remove

(Testimony of Milton B. Grossman.)

the slot and it didn't require that extra eighth of an inch thickness—not thickness, but width.

Q. Do you know whether you changed the overall width of the fixture in such redesign?

A. No, I couldn't say yes or no to that.

Q. Did you change the number of transverse louvers in that fixture in that redesign?

A. No, sir, I didn't.

Q. Did you change the angle between the sides of the longitudinal V-shaped louver in that redesign? [455]

A. No, sir.

Q. Did you change the angle with the horizontal of the upper or lower edges, slanting edges, of the ends of that design?

A. No, sir.

Q. Did you change the angle with the vertical of the sides of the ends of that design?

A. No, sir.

* * *

Q. There are in evidence here some catalogs containing illustrations of the Paramount fixture like Plaintiff's Exhibit 14 or 15. Did you ever see, while you were employed by the defendant corporation, any advertisements distributed by that company of its Paramount lighting fixtures other than catalog sheets illustrating them? [456]

A. There are various catalog sheets. I would like to know the one you are talking about.

Q. I am referring to catalog sheets in general that were put out to the trade by the Ruby Corporation. Do you know of any other advertisements that were distributed by the defendant of its Paramount

(Testimony of Milton B. Grossman.)

fixture besides the catalogs distributed to the trade?

A. Yes. Individual data sheets in short quantities were run off sometimes when a request was made for some illustrations of either a fixture or its use.

Q. Do you know of any advertisements that were placed in magazines or trade publications by the defendant corporation offering for sale or illustrating the Paramount fixture? A. No.

Q. And you were with the defendant corporation commencing in July 1947 until what date?

A. About August, '48.

Q. And neither before that employment——

A. One moment, please. You said 1947, didn't you, sir?

Q. That is what I understood was the date when you went to work for——

A. No, that is incorrect. I went to work for Ruby on July 17, 1948, and I terminated in August, 1949.

Q. Neither before that employment, nor during it, nor after the employment, did you see any ads in magazines or trade [457] publications by the defendant advertising for sale and illustrating its Paramount fixtures; that is true, isn't it?

A. I don't recall any ads, no, sir.

* * *

Q. In your direct examination you were asked about the range of dimensions of fixtures like the Paramount fixture Plaintiff's Exhibits 14 and 15, which made those fixtures generally acceptable, and you mentioned that for a two-lamp fluorescent light

(Testimony of Milton B. Grossman.)

fixture the height or depth might vary between 6 and 8 inches. That variation in height could be in increments of an eighth of an inch all the way from 6 up to 8 inches, couldn't it?

A. No, sir, it couldn't be. To take your words and say yes or no would be incorrect. They would have to be in increments that productive equipment of Ruby Lighting permitted of. [458]

* * *

The Court: Let's end this by saying that the Court will take judicial notice that whether a plant has equipment or not, it could make tools and make jigs and dies and could make equipment in any range of fractional parts of an inch from 6 inches to 8.

Mr. Foster: Thank you.

Q. You testified that the range of widths could be 12 to 18 inches and cut-off angles varied between 27 and 32 degrees, but I don't think you testified to the range of overall lengths of a fixture that would be generally acceptable for a two-lamp fluorescent fixture, accommodating a 48-inch tube. What would be that variation?

A. It would run from 48 inches in the open type of pan fixture without any kind of surrounding element, all the way up to 51 inches, depending on the kind of end plates or assemblies, and also depending on the revisions being met, [459] such as those of the Underwriter Laboratory, which very specifically restrict dimensionally the spatial positions of knock-out, conduit holes, socket holders, and things of that

(Testimony of Milton B. Grossman.)

nature. For your information, I have a copy here of the Underwriter Laboratory Standard for Electric Lighting Fixtures, which indicates some of those restrictions which would control.

Q. Without reading that, would you attempt to answer my question, what range of overall dimensions would be generally acceptable for a two-lamp fluorescent tube fixture to accommodate a 48-inch tube?

A. Well, from 48 inches I would say up to a maximum of 54 inches. [460]

* * *

Q. Are all of the designs which you have shown in Defendant's Exhibit G functional designs?

A. Yes. I think they are pretty good.

Q. You used that term "functional design" several times in your direct examination. What is your definition of it, as you have used it?

A. My understanding of a functional design, as far as a product is concerned, a house, or anything of utilitarian purpose, is a design whose form overall originates from the essential functions of the product; a design that aesthetically is good, because functionally—because it follows in its design elements the functional requisites and purposes of the item.

Q. You are a disciple of the Sullivan school, aren't you? [462]

A. To a point, yes, sir.

Q. As I understand it, the creed of that school

(Testimony of Milton B. Grossman.)

may be briefly stated as being that function determines form?

The Court: What school is this?

The Witness: Sullivan and Frank Lloyd Wright.

Q. (By Mr. Foster): Is that correct?

A. It is a vulgarization of it, but it amounts to that.

Q. I direct your attention to Defendant's Exhibit I, and particularly, the patents which are contained in that exhibit, being tabs 1 to 16, and showing light fixtures. You have looked over that exhibit?

A. In a cursory way, I have.

Q. Are the fixtures which are shown in those tabs, 1 to 16 of that exhibit, of functional design?

A. Categorically, or can I indicate my reaction to the individual ones?

Q. Can you, from your knowledge in having looked through them, indicate whether they are, in general, functional designs?

Mr. Miketta: Mr. Foster, I understand you were just asking a general question. You do not want a detailed analysis?

Mr. Foster: No. That is what I am asking.

The Witness: If it is a general question, I will answer [463] it with a general answer, that some of these, in the main, have good functional design, but they are overloaded with a lot of trim which in their day was considered necessary but which today isn't.

Q. (By Mr. Foster): But as to their over-all

(Testimony of Milton B. Grossman.)

appearance in general the fixtures shown in 1 to 16 of defendant's Exhibit I are, in general, of functional design?

A. Some of them are. I take exception to calling No. 5 anything functional in its over-all entity, although it has elements of functional design in terms of the proper use of the light output, but the rococo effect that has been tied into it is not functional.

Q. The same is true, isn't it, as regards the lighting fixtures shown in the catalogs 17 to 20, included in Defendant's Exhibit I, that is, having regard to their over-all appearance?

A. First of all, if I may correct you, sir, they are not catalogs. They are excerpts from Illuminating Engineering, dated February, 1941.

Q. With that correction, will you direct your attention to that, and isn't it true the fixtures there shown, with regard to their over-all appearance, generally are of a functional design?

A. In the main, they are.

* * *

Q. Did you mean, when you used the term "functional design," that you had reference to the over-all appearance of the fixture?

A. No, I mean the end aesthetic result. [465]

Q. Of the fixture?

A. Of the fixture. [466]

* * *

Q. (By Mr. Foster): During the time you were employed by the defendant corporation, how many

(Testimony of Milton B. Grossman.)

salesmen did it have—how many employees who were devoting efforts to sales of the Paramount fixture?

A. I don't know that anyone was ever devoting any effort to the sale of the Paramount fixture. It was considered a very bad fixture.

Q. What efforts, to your knowledge, did the corporation make to sell those fixtures, either before you were employed by that company, or during such employ?

A. None that I know of, other than to include it in the catalog I worked on with the other fixtures that were included, which were no longer being produced. [467]

* * *

Mr. Miketta: Now, at this time I make this offer of proof, that Mr. Ruby, if called upon to testify, would testify that the fixtures whose outlines are indicated on Exhibit G, tab 1, tab 2, and tab 3, were made, manufactured and sold in appreciable quantities during the year 1941 and for several years thereafter, but are not being sold at the present time because fixtures closely resembling those fixtures were copied by the Sunbeam crowd, their former employees, so they had to change their designs in order to try to distinguish [469] from the Sunbeam fixtures which were being manufactured.

The Court: Will you so stipulate, Mr. Foster?

Mr. Foster: I will so stipulate, that he would, if called to testify, so testify.

* * *

The Court: The witness' name that this stipulation concerns is Mr. Ruby?

Mr. Miketta: Yes, Mr. Benjamin Ruby. [470]

* * *

The Court: Let's modify the stipulation. That he would testify that the fixtures diagramed on tab 1, 2 and 3 were made by him and sold in appreciable quantities in 1941 and for several years later, but are not being sold now?

Mr. Foster: I will so stipulate.

Mr. Miketta: Very well. [471]

* * *

Mr. Foster: We rest, with this exception: I would like to repeat the request—I would have asked Mr. Ruby had he gone on the stand—that the record show the number of sales of the Ruby Paramount fixture by the month from the beginning until date, approximately, and I am perfectly willing to stipulate that may be filed when it is compiled, if it takes any compiling, and it be deemed that Mr. Ruby has testified to the approximate correctness of the figure.

Mr. Miketta: I believe that should be held in abeyance until your Honor has decided the prime issue.

The Court: You want it on the issue of whether there was a substantial or a nominal amount of sales?

Mr. Foster: Yes, I want it on that and would argue from that that this shows an appropriation of

our market that we had created at substantial expense. [472]

The Court: I think it would be proper to inquire what those sales amounted to without being proof on the issue of damages, but on the general subject, Was there only one of two fixtures sold or Were there a million of them sold? In other words, are we dealing with a matter that is of trifles, or are we dealing with something that is substantial?

It need only be an approximation. It may be enlarged upon and made more certain if necessary, if there is hereafter any further proceedings on the matter of damages.

Mr. Miketta: Will the court accept my statement as to the figure?

Mr. Foster: I will accept it.

The Court: Yes.

Mr. Miketta: I will just give the hundred figures, your Honor. For the year 1947——

The Court: What fixture are you talking about?

Mr. Miketta: We are talking about the defendant's two-tube Paramount fixture.

The Court: All right.

Mr. Miketta: Illustrated by Plaintiff's Exhibit 14.

For the year 1947 the sales amounted to a little over 600.

The Court: Dollars or units?

Mr. Miketta: Fixtures.

For the year 1948, a little over 1300 fixtures. [473]

For the year 1949, a little over 500 fixtures.

Mr. Foster: Where there sales of the four-tube, too?

Mr. Miketta: No.

The Court: You say you don't have it on the four-tube?

Mr. Miketta: No, your Honor. There is this to be remembered——

Mr. Foster: You don't have figures or there weren't any sold?

Mr. Miketta: I do not have any figures for that.

* * *

Mr. Miketta: Frankly, this is something that your Honor should consider: The plaintiff's fixture is a two-tube fixture, they do not manufacture a four-tube fixture for this design and therefore there is no competition. [474]

* * *

The Court: ——I am wondering if we should not dispose of your motion to file this third cause of action by amendment, before we get into the argument, for the bearing it will have on the argument. [483]

* * *

I think I would like to hear from Mr. Miketta as to whether he will be hurt in any way by the filing of the amendment.

Mr. Miketta: Very frankly, your Honor, this court has authority under Rule 15(b) to accept such an amendment. That particular cause of action will either stand or fall on the evidence, and I am willing to have your Honor admit it, and I will not press

any further objection to it, as, under the law, I think it is permissible.

The Court: Your defense to it would be the same type of defense you made to the other causes of action, would it not?

Mr. Miketta: It either stands or falls on the evidence as it is.

The Court: All right. I am, therefore, going to grant the motion to file the document entitled "First Amendment to the Complaint," lodged March 2, 1950. It will be filed [484] by the clerk.

Now, in order to have the issues under that cause of action, what can we do?

Mr. Miketta: May I just orally deny the allegations of that amended complaint or that amendment to the complaint?

Mr. Foster: That is acceptable to the plaintiff, your Honor. I presume that a formal written answer should be filed, and we are agreeable to its being filed at any convenient time by the defendant, and to be taken as filed now.

Mr. Miketta: Very well.

The Court: All right. I take it there will probably be no objection to Paragraphs 1 and 2 on the question of jurisdiction?

Mr. Miketta: No, your Honor.

The Court: The defendant then denies orally each and every allegation of Paragraphs 3 and 4?

Mr. Miketta: Yes, your Honor.

The Court: And permission is granted to the defendant to subsequently file a formal written answer, to be filed in the records of this court.

Mr. Miketta: Very well, your Honor. It shall be done.

The Court: To be filed within five days. Is five days sufficient?

Mr. Miketta: Oh, yes; surely. [485]

The Court: All right. [486]

* * *

The Court: I could understand those cases if they referred [509] to the design in toto. But do you contend that those cases go so far as to hold that if there was one part of this design which had a mechanical function or a functional purpose, and someone else prepared a design where they used that particular portion that was in there for a functional purpose, that they would infringe on the first patent?

Mr. Foster: No, sir, I do not. I think the separate parts of any patented design which have mechanical utility, they are free for use by anyone. But I think this statement more nearly applies to the facts here: That the patented design is a composite whole or summation of a number of elements of appearance. Some of those elements of appearance are related to parts that have utility and they must have somewhat the same design, shape or configuration, perhaps, or relation to the other parts that they do have that utility. For example, the angle of the sides here is one that permits the sides of the shield to have utility. The angle could be a different angle according to the testimony than the angle it is, within rather a wide range, and still the entire fixture would have utility. So that no design

patent can prevent a rival manufacturer from making a fixture in which the sides are at an angle to the vertical or the horizontal. But I say, and I think the decisions support the declaration, that the design patent on such a device as this fixture covers the composite whole, the overall general appearance to the eye, [510] and a part of that is the angle of the sides of the fixture in relation to the other parts of the fixture, and that we must look always at the composite whole. And the fact that those elements, their relation or shape or their special relation to the other parts contributes to the utility of the design, as for example that the angle of the sides permits light to be transmitted, and that is useful, does not detract from the patent-ability. Those relationships, those shapes, could be changed, their relationship to each other could be changed greatly and we would still have a useful lamp.

We don't seek to prevent anyone from doing that. I think that is borne out by the testimony of the last witness who is a disciple of the Sullivan school of form that utility or function dictates the form. He found that there were functional designs in practically all of these prior lamps in the catalogs, and yet to me their overall appearance and appeal are very different from each other, and yet they have function.

I divorce in my own mind, and I think it is proper, your Honor, the definition of functionality as applied to the element into two concepts: One, where the element has no function unless it has a particular shape with relation to the other parts that it has, and the other where the element has some func-

tion in that shape compared to the other dimension and with relation to the other parts, but would also have a function of a different shape, different relative dimensions and different [511] relationship to the parts. And it is to the latter, your Honor, that I direct the statement and these decisions that the functionality or the fact that the patented design has utility, functions well for an intended purpose, does not detract from its patentability. [512]

* * *

Mr. Miketta: While your Honor's mind is still on the matter of the secondary meaning. I will agree with counsel for the plaintiff in this, that, under the proper conditions, a person can acquire a secondary meaning in the dress of an article.

The Court: Without a name?

Mr. Miketta: Yes, irrespective of name, your Honor. That is very true.

The Court: You mean, for instance, a package?

Mr. Miketta: That is right.

The Court: Suppose I put out a package with red, white, and blue stripes around it for years and spent money on it, you mean that package dress might become so well identified with my name that you wouldn't think of the red, white, and blue stripes, but think of the article inside of it?

Mr. Miketta: And, very important, think of the manufacturer. [526]

The Court: Think of the manufacturer.

Mr. Miketta: —because that is an essential part of establishing secondary meaning. [527]

* * *

Mr. Miketta: In the first place, it wasn't 12 hours. Mr. Ruby, in his deposition back in May, on May 4, 1949,—if he said anything about 12 hours, I think it was in response to a leading question, because Mr. Ruby didn't want to argue. He stated that they were making the design over, say, a couple of weeks. According to his answer, he admitted he didn't work continuously on it during those couple of weeks but upon being pressed by counsel for the plaintiff, in answer to the following question, this is what happened:

“Q. Mr. Ruby, how much time continuously?

“A. A week or 10 days.

“A 35-hour week would make it 35 to 50 [549] hours:

“A. Yes, that's it.”

Now, that is the best they could get as to the amount of time that Mr. Ruby spent on it. He admitted in his deposition that he and this draftsman——

* * *

The Court: Is there any objection to putting it in the record?

* * *

Mr. Foster: I will stipulate he has testified to what you read from the deposition. [550]

* * *

The Court: The portion read by counsel will be admitted as a part of the case. The case is reopened for that admission, and then reclosed. [551]

* * *

The Court: That is right. I was reading the last

sentence. And I think I can say parenthetically here there is no direct evidence.

Mr. Foster: None direct.

The Court: That any customer in the trade associates the plaintiff's name with this type of fixture.

Mr. Foster: I think that is true. [565]

* * *

As to the patent which is shown in Exhibit 3, being the patent with the smaller number, if I were to hold that patent valid as a design patent in any way that would affect the rights [571] of this defendant, I would have to take into account the side wall, the louvers, I would have to take into account the general design of that patent.

I don't think I can do that.

I have in mind this Challenger model appearing in Exhibit 9, subdivision H, which has side walls, has louvers underneath, has the same general appearance and, as a matter of fact, it was cited as a reference before the Patent Office.

If Patent 138,990 is valid, as a design patent, in my opinion it is limited to the configurations on the end. And there are no configurations on defendant's devices which are, to my mind, similar enough to constitute infringement. I therefore would not find infringement, either.

Of course, infringement wouldn't be involved if the patent weren't valid. I am assuming for argument that that part of the patent 138,990 would be valid, namely, the configurations. I don't find that the configurations on defendant's devices infringe.

The only possibility is the general outline shape

of the lamp. The outline shape is not new. The bevel bottom or the bottom being on a different line than a horizontal, the slant sides at about that angle, appear in many of these devices. The length of the device is largely controlled by the length of the bulb. At any rate, my conclusion is that [572] patent 138,990 is a valid design patent only insofar as the design and configuration on the end thereof is concerned; and that, secondly the defendant does not infringe by his design.

I reach the same conclusion as to Patent No. 2, limited, of course, to the scope of the second patent, namely, it involved the longitudinal louver. The longitudinal louver was shown in prior art, which was not considered by the Patent Office.

I seriously question whether anyone applying the test you contend for with respect to a casual observer of the device would even notice the longitudinal louver. But assume it would be noticed by a casual observer, the V-shape was shown in prior art which is in evidence.

The bead may have been new. I think you have a patent in No. 143,631. It is limited to the bead, which I don't think is shown in the device.

As to unfair competition, I have this to say, and this isn't a finding. I may make such findings as I choose, but I am just telling you what I think about this unfair competition count, because that is being taken under submission. It is hard for me to believe that Mr. Ruby even in eight or 10 hours or 12

hours working with an employee whose first name only he knew, whose last name he couldn't remember or find, could sit down and draw or have drawn for him a design as near [573] to the plaintiff's design as this one shown by Plaintiff's Exhibits 14 and 15. There is a lot of identity in those exhibits. But even if I should make that kind of finding, I am convinced that the law is, as far as the structural device alone is concerned, where there is no trademark or patent protection, that the world is free to make that device. It may be that Mr. Ruby sat down with that device in front of him and copied it or had this employee copy it. Still there is a question in my mind whether or not a cause of action of unfair competition can be stated in view of the authorities I have been looking at, and the citations I have given you.

There is not complete identity. It is not a Chinese copy. There are differences in structure, in the functional operation. There is, of course, a different design on the end. The similarity consists largely in length and height, and the number of louvers, and somewhat in the end shape, although there has been a variation in the end shape as is conceded by the exhibits here.

The evidence shows that Mr. Ruby, although he may have copied Plaintiff's Exhibit 13, or plaintiff's design patents, there is no evidence that he ever sold them as the products of the Day-Brite Company, or advertised them as the products of Day-Brite, or traded on the Day-Brite name. In the absence of some fact which would show this

misrepresentation, or some facts which would show some secondary meaning attached to [574] plaintiff's products, I cannot see a cause of action for unfair competition. I think, probably, other elements of your case are there.

You have shown the building of a market; you have shown competition.

The case will be submitted. I think from what I have said it will be submitted solely upon the ground of whether or not the authorities show a cause of action on unfair competition.

* * *

As you will observe from my remarks, from the standpoint of the equities here, I would say that they rest in favor of the plaintiff. But that does not mean that the plaintiff is [575] entitled to a judgment in this cause. I am inclined to think that Mr. Ruby might be subject to some criticism, if there is any legal right that he has violated. But if I read these cases correctly, he could have sat down at a table and taken the plaintiff's device and put it in front of him and copied it verbatim and probably made a Chinese copy, and as long as he didn't say this is a Day-Brite product and not a Ruby product, there would be no legal right against him.

The case will be submitted, and thank you for your assistance and help. [576]

* * *

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of March, A.D. 1950.

/s/ SAMUEL GOLDSTEIN,

/s/ MARIE G. ZELLNER,

Official Reporter.

[Endorsed]: Filed July 25, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 64, inclusive, contain the original Complaint; Answer to Complaint; Stipulation re Proof; First Amendment to Complaint; Answer to First Amendment to Complaint; Affidavit of C. A. Miketta re Attorneys' Fees and Costs; Findings of Fact and Conclusions of Law; Judgment and

Decree; Notice of Appeal; Cost and Supersedeas Bond on Appeal; Order Staying Judgment for Attorneys' Fees and Taxed Costs; Stipulation and Order Extending Time to Docket Appeal; Statement of Points on Appeal; Designation of Record on Appeal and Counter-Designation of Record on Appeal, and full, true and correct copy of minute order entered Mar. 22, 1950, which, together with original Plaintiff's Exhibits Nos. 1 to 20, inclusive, and original Defendant's Exhibits A to L, inclusive, and copy of reporter's transcript of proceedings on February 28, 1950, March 1, 2 and 3, 1950, (in four volumes) transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 1st day of August, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12633. United States Court of Appeals for the Ninth Circuit. Day-Brite Lighting, Inc., a corporation, Appellant, vs. Ruby Lighting Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 3, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,633

DAY-BRITE LIGHTING, INC., a Corporation,
Appellant,

vs.

RUBY LIGHTING CORPORATION, a Corpora-
tion,

Appellee.

NOTICE OF ADOPTION OF STATEMENT OF POINTS

Appellant in the above-entitled cause hereby formally adopts as its statement of points on appeal under Rule 19(6) the Concise Statement of Plaintiff-Appellant's Points on Appeal Pursuant to F.R.C.P. 75(d), dated June 29, 1950, appearing in the record on appeal on file herein.

Dated: At Los Angeles, California, this 15th day
of August, 1950.

CARR & CARR & GRAVELY,
JOSEPH J. GRAVELY.

HARRIS, KIECH, FOSTER &
HARRIS,

WARD D. FOSTER,

JACK BARRY, JR.,

By /s/ WARD D. FOSTER,
Attorneys for Appellant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed August 21, 1950.

[Title of Court of Appeals and Cause.]

STIPULATION RE BOOKS OF EXHIBITS
AND PRINTING OF RECORD

It Is Hereby Stipulated, by and between the parties to the above-entitled appeal, through their respective counsel and subject to the approval of the Court:

That only the following exhibit shall be included in the printed record on appeal: Plaintiff's Exhibit 17;

That the following exhibits shall not be printed in the record or included in the book of exhibits, they being physical exhibits:

Plaintiff's Exhibits 1, 2, 6 to 10, inclusive,
13 to 16, inclusive, and 18 to 20, inclusive,
Defendant's Exhibits A, D, E, F, and H.

That only the following exhibits shall be prepared in books of exhibits, and the Clerk is requested to prepare only six (6) copies of such books of exhibits and, when they are completed, to transmit one to counsel for each of the parties to this appeal and to retain four (4) copies for the use of the Court, and to utilize those printed copies of patents provided by counsel for either party in the preparation of said books of exhibits:

Plaintiff's Exhibits 3, 4, 5, and 11,
Defendant's Exhibits G, I, K, and L.

Dated: At Los Angeles, California, this 17th day
of August, 1950.

CARR & CARR & GRAVELY,
JOSEPH J. GRAVELY.

HARRIS, KIECH, FOSTER
& HARRIS,

WARD D. FOSTER,

JACK BARRY, JR.,

By /s/ WARD D. FOSTER,
Attorneys for Appellant.

C. A. MIKETTA,
WILLIAM W. GLENNY,

By /s/ C. A. MIKETTA,
Attorneys for Appellee.

Approved and It Is So Ordered, this 21st day of
August, 1950.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,

/s/ WM. E. ORR,
Circuit Judges

[Endorsed]: Filed August 22, 1950.

